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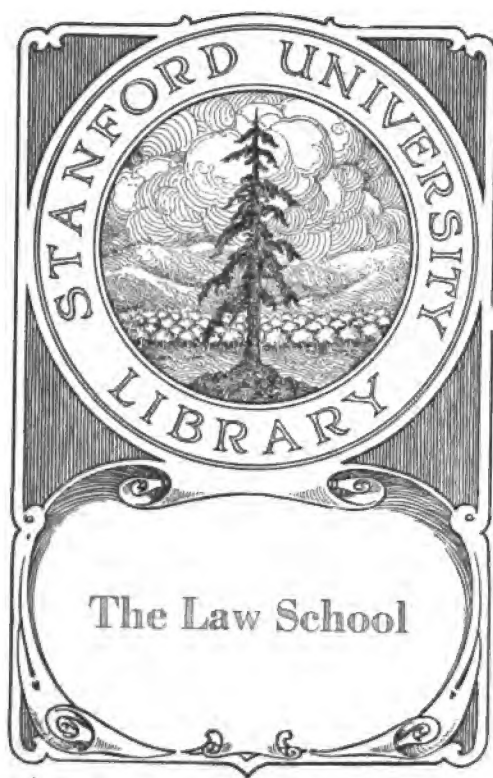
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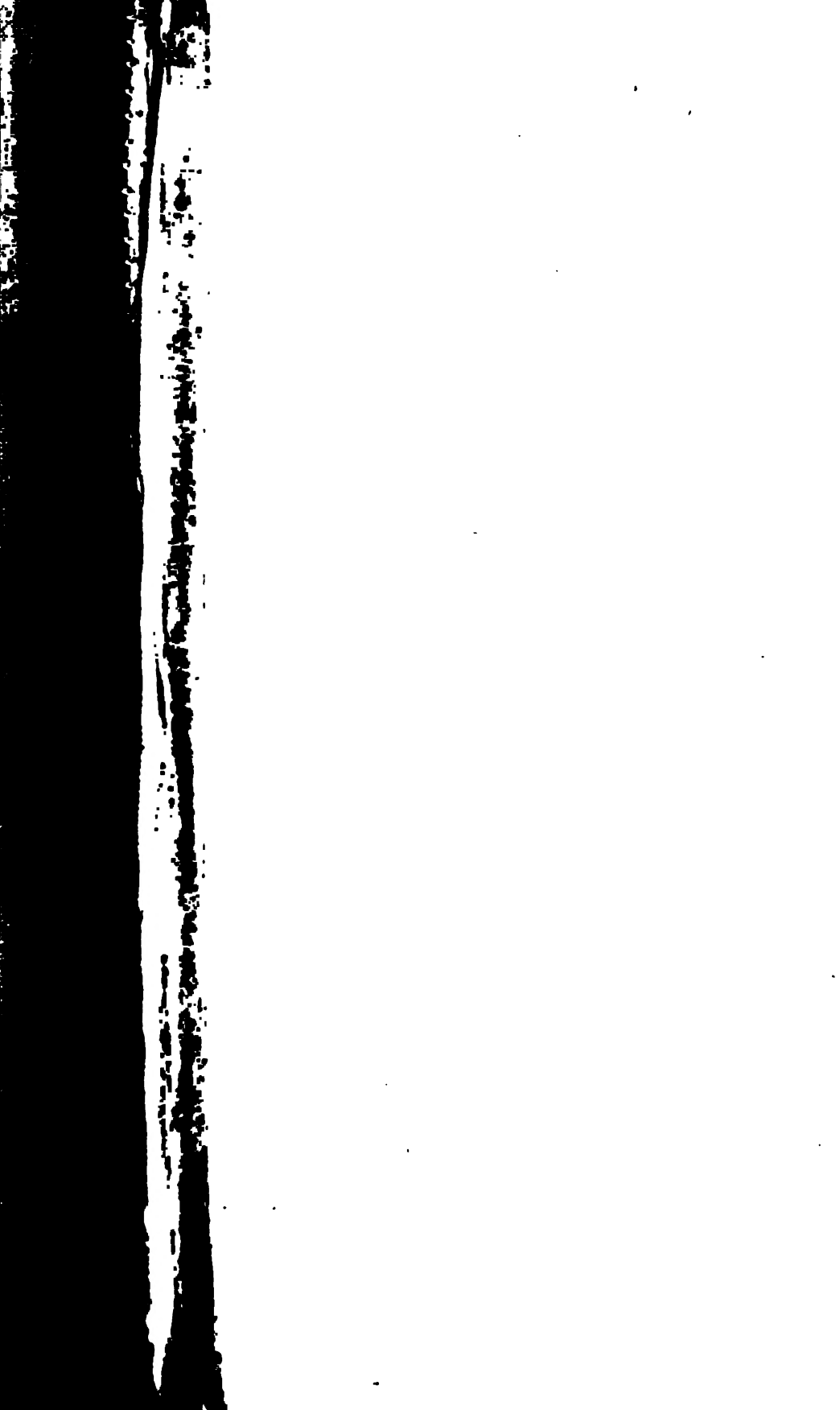
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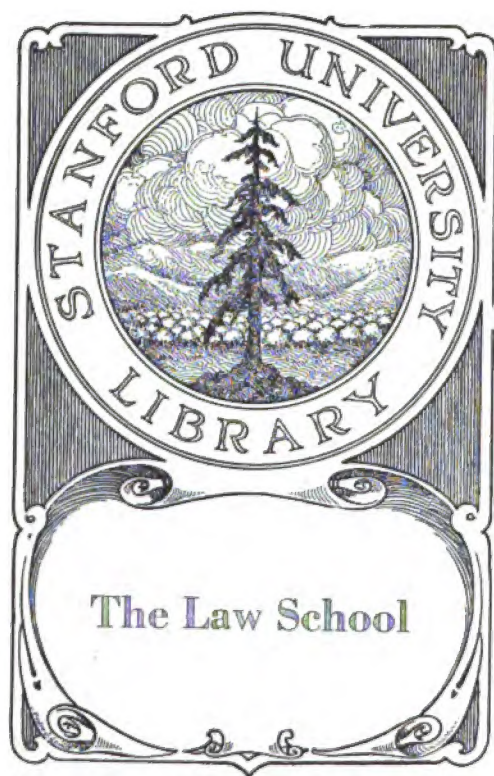
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

HILARY TERM, 3 VICT.

TO

TRINITY TERM, 3 VICT., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.



VOL. VI.



LONDON:

S. SWEET, CHANCERY LANE; A. MAXWELL, BELL YARD;
AND V. & R. STEVENS & G. S. NORTON, PORTUGAL STREET & BELL YARD.

And Booksellers & Publishers:

AND ANDREW MILLIKEN, GRAFTON STREET, DUBLIN.

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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honorable JAMES, Lord ABINGER,
Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.
Sir ROBERT MOUNSEY ROLFE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir THOMAS WILDE, Knt.

ERRATA.

Page 93, note (c), *add* 8 Dowl. P. C. 309.

236, line 9, and page 245, line 4, from bottom, *for* eastward, *read* southward.

271, line 10, *for* did not obtain, *read* had obtained.

331, note, col. 1, line 29, *for* seventy, *read* twenty.

402, line 9, from bottom, *for* however—supposing, *read* “ However, supposing.

517, line 5, *for* arrivat, *read* arrivant.

681, the references (a) and (b) are transposed.

684, line 3, *for* his, *read* their.

727, last line, *dele* not.

728, line 3, *for* in altogether, *read* not in.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

HILARY TERM, 3 VICTORIÆ.

REGULÆ GENERALES.

Hilary Term, 3 Vict. 1840.

*Esch. of Pleas,
1840.*

IT IS ORDERED, That every person who shall intend to apply for admission as an attorney of this Court, and who shall not have been admitted an attorney and solicitor of any other Court, shall, (in addition to the notices to be given to the Examiners, Masters, &c., as required by a rule of Hilary Term, 6 Will. 4, 1836, read in all the Courts), for the space of one full Term previous to the Term in which he shall apply to be admitted, cause his name and place or places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articled,

Admission of
attornies in the
Exchequer.

Exch. of Pleas,
1840.

written in legible characters, to be affixed in the Exchequer Office of Pleas, in such place as public notices are usually fixed; and also enter or cause to be entered, in two books to be kept for the purpose, one at the Chambers of the Lord Chief Baron, and the other at the Chambers of the other Barons of this Court, his name and place and places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articulated.

ABINGER,	J. GURNEY,
J. PARKE,	R. M. ROLFE.
E. H. ALDERSON,	

Forms of writs
of ca. sa. under
1 & 2 Vict.
c. 110, s. 20.

IT IS ORDERED, That the following forms of writs, framed by the Judges pursuant to the statute 1 & 2 Vict. c. 110. s. 20, be used from and after the first day of next Easter Term, in the cases to which they are applicable, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case, may render necessary; and that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back or at the foot of the writ, directing the sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered, and interest thereon at the rate of 4*l.* per cent. per annum from the time when the judgment was entered up, or, if it was entered up before the 1st October, 1838, then from that day; and that, in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty and the damages and costs recovered, and the interest

thereon calculated as aforesaid, it shall be stated in the body of the writ, that the sheriff is to levy interest at the rate of 4*l.* per cent. per annum, from the — day of —, and on the back, or at the foot of the writ, there shall be a memorandum as above directed; and that, in the case of an assessment of further damages under a writ of *scire facias*, pursuant to the stat. 8 & 9 Will. 3, it shall be stated in the body of the writ of execution, that the sheriff is to levy interest on the damages assessed and costs taxed in that behalf, at the rate of 4*l.* per cent. per annum from the day on which execution was awarded, unless execution was awarded before the 1st October, 1838, and, in that case, from that day. But it is further ordered, that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

Each. of Pleas,
1840.

— — —
No. 1.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £——, which the said A. B. lately in our Court before us at Westminster recovered against the said C. D. for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record; together with interest upon the said sum of £——, at the rate of 4*l.* per centum per annum, from the — day of —, in the year of our Lord

Writ of *capias ad satisfaciendum*, on a judgment in the Court of Queen's Bench, in an action of *assumpsit*.

Exch. of Pleas, — (a), on which day the judgment aforesaid was entered
1840.
up; and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the
— day of —, in the year of our Lord —.

NOTE.—This and all other writs of execution may be made returnable
on a day certain in term.

—◆—
No. 2.

Writ of *capias*
ad satisfaci-
endum, on an
order of the
Court of
Queen's Bench,
for payment of
money.

Victoria, by the Grace of God, of the United Kingdom
of Great Britain and Ireland, Queen, Defender of the
Faith, to the Sheriff of —, greeting. We command
you that you take C. D., if he shall be found in your baili-
wick, and him safely keep, so that you may have his body
before us at Westminster, immediately after the execution
hereof, to satisfy A. B. £—, which lately in our Court
before us at Westminster, by a rule of our said Court, in-
titled, &c., [*as the case may be*], were by the said Court
ordered to be paid by the said C. D. to the said A. B., and
further to satisfy the said A. B. interest upon the said sum
of £—, at the rate of 4*l.* per centum per annum from
the — day of —, in the year of our Lord — (b), on
which day the said rule was made; and have there then this
writ.

Witness, Thomas Lord Denman, at Westminster, on the
— day of —, in the year of our Lord —.

—◆—
No. 3.

Writ of *capias*
ad satisfaci-
endum, on an

Victoria, by the Grace of God, of the United Kingdom
of Great Britain and Ireland, Queen, Defender of the

(a) The day on which the judg-
ment was entered up, or if entered
up prior to the 1st of October, 1838,
say, from the 1st day of October, in
the year of our Lord 1838, omitting
the words "on which day the judg-
ment aforesaid was entered up."

(b) The day on which the rule
was made, or if it were made prior
to the 1st of October, 1838, say,
from the 1st day of October, in the
year of our Lord 1838, omitting
the words "on which day the said
rule was made."

Faith, to the Sheriff of —, greeting. We command you that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £—, which lately in our Court before us at Westminster, by a rule of our said Court, intitled, &c., [*as the case may be*], were by the said Court ordered to be paid by the said C. D. to the said A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court, at the sum of £—, and further to satisfy the said C. D., the said sum of £— (a), together with interest upon the said two several sums of £— and £—, at the rate of 4*l.* per centum per annum, from the said — day of —, in the year of our Lord — (b); and have there then this writ.

Exch. of Pleas,
1840.

order of the
Court of
Queen's Bench,
for payment of
money and
costs.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

—◆—
No. 4.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you have his body before us at Westminster immediately after the execution hereof, to satisfy A. B. £—, which the said A. B. lately in [*insert the style of the Court*], by the judgment of the said Court, recovered against the said C. D. for his damages, which he had sustained as well on occasion of the not performing

Writ of capias
ad satisfaci-
endum, on a
judgment in an
inferior Court
in an action of
assumpsit, re-
moved into
the Court of
Queen's Bench.

(a) The amount of the costs were prior to the 1st of October, 1838, say, from the 1st day of October,

(b) The day on which the costs of the rule were taxed, or if that 1838.

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certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and which judgment was afterwards, on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster, [*or, of —, one of the justices of our said Court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court before us at Westminster at the sum of £—, and further to satisfy the said A. B. the said sum of £— (a), together with interest upon the said two several sums of £— and £—, at the rate of 4*l.* per centum per annum, from the said — day of —, in the year of our Lord — (b); and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.



No. 5.

*Writ of capias
ad satisfaci-
endum, on an
order of an
inferior Court
for payment of
money, removed
into the Court
of Queen's
Bench.*

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster immediately after the execution hereof, to satisfy A. B. £—, which lately in [*insert the style of*

(a) The costs attendant upon the removal of the judgment out of the inferior Court into the Court of Queen's Bench.

(b) The day on which the costs of removal were taxed.

the Court], by a rule of the said Court, intituled, &c. [*as the case may be*], were by the said Court ordered to be paid by the said C. D. to the said A. B., and which rule was afterwards, on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by an order of our said Court before us at Westminster, [*or, of —, one of the justices of our said Court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided; and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court before us at Westminster at the sum of £—, and also to satisfy the said A. B. the said sum of £— (a), together with interest on the said two several sums of £— and £—, at the rate of 4l. per centum per annum, from the said — day of —, in the year of our Lord — (b); and have there then this writ.

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1840.*

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

—◆—
No. 6.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster immediately after the execution hereof, to satisfy A. B. £—, which lately in [*insert the style of the Court*], by a rule of the said Court, intituled, &c., [*as*

Writ of capias ad satisfaciendum, on an order of an inferior Court for payment of a sum of money and costs, removed into the Court of Queen's Bench.

(a) The costs of removing the rule of the inferior Court into the Court of Queen's Bench. (b) The day on which the costs of removal were taxed.

Exch. of Pleas, the case may be], were by the said Court ordered to be
 1840. paid by the said C. D. to the said A. B., and also £—— for
 the costs of the said rule, by the said Court also ordered
 to be paid by the said C. D. to the said A. B., which said
 rule was afterwards, on the —— day of ——, in the year
 of our Lord ——, removed into our Court before us at
 Westminster, by an order of our said Court before us at
 Westminster, [*or*, of ——, one of the justices of our said
 Court before us at Westminster, *as the case may be*], in pur-
 suance of the statute in such case made and provided; and
 the costs attendant upon the application for the said last-
 mentioned order, and upon the said removal, were, on the
 —— day of ——, in the year of our Lord ——, taxed and
 allowed by our said Court before us at Westminster at the
 sum of £——, and also to satisfy the said A. B. the said
 sum of £—— (*a*), together with interest on the said three
 sums of £——, and £——, and £——, at the rate of 4*l*.
 per centum per annum, from the —— day of ——, in the
 year of our Lord —— (*b*); and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the
 —— day of ——, in the year of our Lord ——.

DENMAN,	J. GURNEY,
N. C. TINDAL,	J. WILLIAMS,
ABINGER,	J. T. COLERIDGE,
J. LITLEDALE,	T. COLTMAN,
J. PARKE,	T. ERSKINE,
J. B. BOSANQUET,	W. H. MAULE,
E. H. ALDERSON,	B. M. ROLFE.
J. PATTESON,	

(*a*) The costs of removing the
 rule from the inferior Court into
 the Court of Queen's Bench.

(*b*) The day on which the costs
 of removing the rule from the in-
 ferior Court were taxed.

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STAPLETON v. JOHN NOWELL and JONATHAN NOWELL.

INDEBITATUS assumpsit for wharfage, and on an account stated.—The particulars stated, that the action was brought for wharfage, to the amount of 50*l.*, due from the defendants to the plaintiff. The defendants pleaded payment into Court of 10*l.*, and no damages ultra; to which the plaintiff replied, damages ultra. At the trial before *Alderson*, B., at the Middlesex Sittings after Michaelmas Term, it appeared that the plaintiff was the proprietor of a wharf on a canal, and the defendants were contractors for supplying the London and Birmingham Railway Company with waggons and various other articles. The plaintiff's counsel put in a letter from the defendant Jonathan Nowell, in answer to a demand by the plaintiff for payment of the 50*l.*, in which he stated that "he was sure the charge for wharfage must have been made through some mistake, as his wharfage account with the plaintiff had been settled, and no fresh liability had been incurred. It was true there were a few waggons on the wharf, but they could be removed if the plaintiff desired it." It was proved also, that goods of the kind supplied by the defendants, amongst them some waggons, were seen on the wharf at that time. No evidence was given to shew the joint liability of the defendant John Nowell, but it was insisted for the plaintiff, that by the payment of money into Court the joint liability of the defendants was admitted. The learned judge was of a different opinion, and accordingly directed a nonsuit.

A plea of payment into court, by two defendants, pleaded to one or more indebitatus counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on, to the amount of the sum paid in; and does not admit the defendants' joint liability to any greater amount, although the plaintiff gives evidence aliunde to fix one of the defendants with liability to a greater amount.

Kelly now moved for a new trial, on the ground of misdirection.—Taking the plea of payment into Court and the evidence together, a liability, at least to some amount, was established against both the defendants. The payment of money into Court by them both, under a joint plea, was an admission of their joint liability, and rendered

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the admission contained in the letter of the one evidence against the other. *Ravenscroft v. Wise* (a) is expressly in point. That was an action of indebitatus assumpsit against four defendants for wages due under a written contract. The defendants paid money into Court; and it was held that they were thereby precluded from shewing that one of them was not a party to the contract. [*Alderson, B.*—That case must now be considered as having been overruled by *Kingham v. Robins* (b), in which the whole doctrine as to the effect of payment of money into Court was fully considered.] There was not in that case any question of joint or several liability; the question was, whether the defendant was liable at all, the jury having negatived the existence of any contract for the fixtures claimed by the plaintiff. But here there was evidence aliunde against one of the defendants; the only question was, whether the other was jointly liable with him. [*Alderson, B.*—Where is the distinction in principle? If the plea of payment into Court cannot render a man liable who would not otherwise be liable at all, how can it render one man jointly liable with another, who is not proved to be so?] The act of payment into Court is evidence independent of the plea: it is evidence of an admission of liability to some part of the plaintiff's demand, amounting to the sum paid in. There is, therefore, an admission here of a partnership liability as to some demand for wharfage; then the other evidence shews it to be an entire contract. It is the same as if the two defendants had made a payment in consequence of a *vivâ voce* demand on both. [*Alderson, B.*—You cannot draw from a plea the same inference as from an act done. If, in trespass, the defendant pleaded not guilty and a justification, no use could be made of the admission in the latter plea to disprove the former; but if he were to say in conversation, "I did the act complained

(a) 1 C., M. & R. 228; 2 Dowl. P. C. 676.

(b) 5 M. & W. 24.

of, but I was justified in doing it," that would be good evidence for that purpose.] Here the plea, having been pleaded after the demand of a specific amount made upon both the defendants, assumes the character of an act done. Here, also, a contract has been proved. In *Kingham v. Robins*, the plaintiff attempted to prove a contract and failed.

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ALDERSON, B.—If this question were now to be considered for the first time after the case of *Ravenscroft v. Wise*, I should have been very desirous, whatever were my own opinion of the authority of that case, to give Mr. Kelly a rule, for the purpose of re-considering it. But after the case of *Kingham v. Robins*, and the authorities there cited, and the full discussion which this subject then underwent, I think the case of *Ravenscroft v. Wise* must be considered as virtually overruled. The doctrines laid down by the Judges in the case of *Kingham v. Robins*, appear to me to have put the principles of law applicable to this subject on a clear and simple foundation. Nor were they then laid down for the first time, for I distinctly recollect Mr. Justice Bayley, then on the Northern Circuit, stating the rule very clearly, and almost in a similar case, that payment of money into Court admits the contract set forth in the declaration, for this reason, that the payment admits that something is due, and therefore must admit that the contract was made by which alone anything is due, from the defendant to the plaintiff. But that does not apply to the case of an indebitatus count, because that is not confined to one contract, but may extend to an indefinite number of contracts between the parties; and therefore the payment of money into Court only in substance admits, that on some one or more of these contracts or causes of action, stated in the general count, the defendant is liable to the plaintiff. The plaintiff here says, On one or more of several contracts I have a

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cause of action. The defendants say, on one or more of those several contracts the plaintiff has a cause of action to the extent of 10/.; but on the residue of the contracts he has no such claim. The plaintiff, therefore, must shew affirmatively that there is some contract on which both the defendants are liable, beyond the amount of the 10/. paid by both the defendants into Court. If he proves no contract at all against both defendants, he fails altogether. If he proves that there is a contract on which both the defendants are liable, he must shew that upon that contract more is due than is covered by the payment into Court. Here the plaintiff proved a *prima facie* case against one of the two defendants, but none against the other; but he says, as John Nowell has paid money into Court, he must be taken as having admitted the particular contract on which Jonathan Nowell was proved to be liable. But both defendants may be jointly liable on one contract, and for a sum not greater than that paid into Court, and Jonathan Nowell alone upon the contract proved. Now the plaintiff undertakes to satisfy the jury affirmatively that he is entitled to recover against both upon that contract. If it be left in ambiguity whether he is so entitled or not, he cannot succeed. Therefore, as it is equally consistent with the facts here proved, either that both defendants are indebted or only one, the jury cannot say affirmatively whether John Nowell is liable on this contract, and ought to be directed to find for the defendants. If so, the plaintiff ought to be nonsuited. On these grounds I retain my opinion, that the nonsuit was right.

GURNEY, B.—I think the nonsuit was right, and I can add nothing to the reasons given for it by my Brother *Alderson*.

ROLFE, B., concurred.

Rule refused.

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EASTWICK v. HARMAN.

DEBT for wages, money paid, and on an account stated. Pleas—first, *nunquam indebitatus*; secondly, payment before action brought; thirdly, a set-off for money had and received by the plaintiff to the use of the defendant: on which issues were joined. The particulars of demand were as follows:—"This action is brought for the recovery of the sum of 11*l.* 10*s.* 4*d.*, with interest thereon from the day the same became payable to the day of payment thereof, being the balance now remaining due from the defendant to the plaintiff on the following account, viz.:—

Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict.

For money paid by the plaintiff for the use of the defendant, in and during the years 1838 and 1839	£ 23 2 0
By cash received at various times during the same period, on ac- count thereof - - -	19 5 0
	<hr/> 3 17 0
Also for wages due from the de- fendant to the plaintiff, for services performed for 16 months in the same years - - -	22 18 4
By cash received by the plaintiff's attorney from the defendant's at- torney, in the month of July in- stant, on account thereof - -	15 0 0
	<hr/> 7 18 4
	<hr/> £11 10 4
	<hr/>

The following were the particulars of the defendant's set-off:—

<i>Exch. of Pleas,</i>	Cash paid to the plaintiff at several times	
1840.	in 1838 and 1839 - - - -	£ 30 10 0
<u>EASTWICK</u>	April 29, 1839—By cash received by the	
<u>v.</u>	plaintiff for the use of the defendant -	1 13 0
<u>HARMAN.</u>	July 10—By ditto paid to Mr. Lyde -	15 0 0
		<hr/>
		£47 3 0

At the trial before *Gurney, B.*, at the *Middlesex Sittings* after Michaelmas Term, it appeared that the plaintiff had been in the defendant's service as coachman and groom, from February, 1838, to June, 1839. His wages for that period amounted to the sum of 22*l.* 13*s.* 4*d.*, mentioned in the particulars, and he proved also the payment of a sum of 1*l.* on account of the defendant. It appeared also, that on application being made, before the action was brought, by the plaintiff's attorney (*Mr. Lyde*) to the defendant for payment, and no answer being received, a writ was sued out; but before service of it, the plaintiff's attorney received an answer from the defendant's attorney, desiring that the defendant might be furnished with the plaintiff's account, and it should be arranged. The plaintiff's attorney wrote in answer, (without stating that a writ had been sued out), "to save further trouble, I inclose a receipt for 15*l.*, and you must also allow me what you like for my attendances." The defendant's attorney accordingly saw the plaintiff's attorney, and told him "they should tender more than was due;" and the plaintiff's attorney said he should admit the tender, and desired him to pay the 15*l.*, which was the sum given credit for in the plaintiff's particulars. The defendant's attorney accordingly gave a cheque for the 15*l.*, which was expressed in the receipt to be received on account and without prejudice. The writ was, however, subsequently served, and the action proceeded with. For the defendant, it was contended, that as the plaintiff, by his particulars, admitted the receipt of this sum of 15*l.*, he must be taken to exclude it from his de-

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mand, although received after the commencement of the action. Evidence was also given of payments to the plaintiff at different times during the period of his service, amounting altogether to about 22*l.*, and of a conversation with him shortly before the commencement of the action, in which he stated, that he should sue the defendant for 27*l.*, the whole amount due to him before he received any money; but that if he had signed his name to any paper, or there had been any witness when he received money from the defendant or any of his family, he should have had nothing to receive. The learned Judge left it to the jury to say, upon the evidence, whether, excluding the payment of the 15*l.* from their consideration, they were satisfied that anything remained due to the plaintiff, or whether he had been paid all that was due to him: and the jury found a general verdict for the defendant.

Humfrey now moved for a new trial, on the ground of misdirection.—The 15*l.* not having been paid until after the commencement of the action, the defendant was not entitled to take advantage of it under this plea, which is a plea in bar of payment before action brought. That issue, therefore, was wrongly found for the defendant. [*Alderson*, B.—Does not the case fall within the rule of Trinity Term, 1 Vict., the payment being credited in the particulars?] That rule was never intended to apply to a payment after action brought. Its object is to meet cases where the plaintiff, “to avoid the expense of a plea of payment,” has given credit in the particulars: that must apply to payments before action brought. In order, therefore, to sustain this plea, the plaintiff was bound to prove payment before action brought. [*Alderson*, B.—It is clear from the particulars, that the plaintiff goes for a balance, after admitting this as a proper payment. The particulars put you in the same position as if the defendant had paid money into Court, and the plaintiff had gone on afterwards and had recovered no more: in that case he

Exch. of Pleas, would have had to pay all the costs.] But in that case
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 there is a period at which the plaintiff has an opportunity of staying his hand, and of obtaining his costs down to the time: in this case he had no such option. Whatever, therefore, might be the effect of the evidence, independently of the 15*l.*, the plaintiff was clearly entitled to recover in respect of that sum.

ALDERSON, B.—I think there ought to be no rule. It seems to me, that where the limit of the plaintiff's claim is defined by the bill of particulars, and he is going only for a balance, after crediting payments, whenever made, the plea of payment is to be taken with reference to that balance. If so, the verdict is certainly right, because the defendant has proved payment to a greater amount than the balance claimed. If this were not so, gross injustice might follow. It is the same as if the plaintiff had two demands, and by his particulars said, I do not go for one of them, but only for the other. That is one view of the case. But, moreover, the plaintiff has had the advantage of having it left to the jury, whether, exclusively of the 15*l.*, and supposing it to have been paid solely as the price of peace, any money was due to the plaintiff at the time of action brought. On that point there was evidence both ways, and the jury might infer from the subsequent payment that there was something due; but there was also evidence on which they might find that the whole amount due had been paid; and even if we were dissatisfied with their verdict, the amount claimed is under 20*l.* I see no misdirection: the learned Judge may have made strong observations on matters of fact, but there was no misdirection in point of law.

GURNEY, B.—I think I gave the plaintiff too great an advantage by excluding the 15*l.*; but, independently of that, the plaintiff had clearly no claim by his own admissions.

Rule refused.

Esch. of Pleas,
1840.

CLASSEY v. DRAYTON.

FITZHERBERT had obtained a rule to shew cause why the interlocutory judgment signed in this cause (an action on a bill of exchange) should not be set aside for irregularity.

An affidavit in support of a rule to set aside an interlocutory judgment must state in express terms that judgment has been signed: and it was held not to be sufficient to state that a rule to compute had been served on the defendant.

Butt, on shewing cause, objected that the affidavit in support of the motion did not shew that any judgment had been signed. It was only stated that a rule to compute principal and interest had been served on the defendant, but there was no direct statement of the signing of the judgment.

Fitzherbert, contrà, urged that this was sufficient, because the service of the rule to compute implied a previous judgment. He submitted also, that as the judgment was an act of the Court, it need not appear by affidavit.

The Court, however, held the affidavit to be clearly insufficient, and the rule was

Discharged.

PUGH v. KERR, Esq.

THE Court having decided in this case that the rule for changing the venue, obtained by the defendant, was con-

In a case in which the venue was laid in Middlesex, the

Court, on the 30th of January, made absolute a rule for changing the venue, obtained by the defendant, "on payment of the costs of the application, and of all costs reasonably and bona fide incurred and rendered useless by that rule." The plaintiff's witnesses were at that time on their way from Wales to London, the sittings commencing on the 1st of February. The defendant drew up the rule and served it on the plaintiff, and served notice of taxation for the 1st of February. The plaintiff thereupon withdrew the record, and sent back her witnesses into the country. On the 8th of February, the costs were taxed under the rule at 20*9*l. 11*s.*; on the 11th, the defendant gave notice that he abandoned the rule, and the Court held that he had a right to do so, the rule being only conditional. The cause was tried at the Middlesex Sittings after Trinity Term, and a verdict found for the plaintiff:—*Held*, that the 20*9*l. 11*s.* were not, under the circumstances, costs in the cause.

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ditional only, and that the defendant had a right to abandon it (a), the cause was tried at the Middlesex Sittings after last Trinity Term, before *Gurney, B.*, when the plaintiff obtained a verdict, damages 65*l.* 10*s.* The costs were taxed on the 14th of November, before Master Walker, the same officer who had taxed the costs under the rule to change the venue: and without going into any fresh taxation of those costs, he allowed the whole sum of 209*l.* 11*s.* before taxed, as costs in the cause. *Cresswell* having obtained a rule to shew cause why the Master should not review his taxation, on the grounds, first, that under the circumstances, these were not recoverable as costs in the cause, and secondly, that the Master had, on the original taxation of them, refused to hear affidavits tendered by the defendant, to shew that they were unnecessarily incurred,—

Jervis and *Welsby* shewed cause.—These are clearly costs in the cause. The rule is, that the plaintiff is entitled to recover, as costs in the cause, all monies reasonably expended, without any default on his part, in the conduct of the cause. The plaintiff here was guilty of no default or misconduct in respect to these costs; they were necessarily incurred for the purpose of being ready for trial here, in case the venue should not be changed. It will be said that the plaintiff ought to have kept her witnesses in town and gone on to trial; but the record was withdrawn under the bonâ fide belief that the defendant was bound and would abide by the rule for changing the venue, which he had actually drawn up and served; and the plaintiff had no notice until the 11th of February, several days after the cause would have been tried in due course, of the defendant's intention to abandon the rule. There could be no complete taxation under that rule,

(a) 5 M. & W. 164.

until the witnesses had returned into the country. The test, whether it would have been an erroneous proceeding on the plaintiff's part to try the cause here, was properly applied, in order to determine whether the change of venue was absolute or only conditional; but the question now is, whether there was any *actual default* on the part of the plaintiff (a).

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Cresswell and *Peacock*, contra.—No part of this sum of 209*l.* 11*s.* is costs in the cause, payable by the defendant. The plaintiff had a right to try the cause in Middlesex, subject to the right of the Court to change the venue. It was originally entered for trial in Middlesex; the record was then withdrawn, and it was re-entered and tried at a subsequent sittings in Middlesex. It did not stand over as a remanet, or by the act of the Court, but by the will of the plaintiff. It is said that the record was withdrawn under an expectation that the venue would be changed according to the rule: but the defendant is not therefore liable to the costs. They were thrown away, because the plaintiff, having a right to go on and try the cause, chose, nevertheless, to withdraw the record, relying on the expectation that the defendant would abide by a rule which the Court has already decided he was not bound to abide by. At least the plaintiff should have tried the cause in the country, and given the defendant the benefit of the change of venue. [*Alderson*, B.—The question is, whether the withdrawing of the record, after the conditional rule to change the venue, was any *default* in the plaintiff?] The defendant contends that it was, because the plaintiff had no right to treat it as an absolute change of venue. The plaintiff ought, at all events, to have been prepared to tax the costs forthwith, whereas the attorney got the taxation postponed, under the pretext that the costs could not

(a) It is not necessary to report the arguments on the other point.

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be ascertained until the witnesses had returned into the country. But further, these costs were specially provided for by the Court on the rule to change the venue, and therefore are not costs in the cause.

ALDERSON, B.—It is of some importance to lay down an accurate rule as to what are costs in the cause; we will therefore take time to see if there is any settled practice on the subject.

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by—

ALDERSON, B.—In this case we are, after full consideration, of opinion that the costs of preparing for the trial, respecting which the dispute has arisen, are not costs in the cause; and it would be therefore unnecessary to send back the second question to the Master, for the purpose of his examining into the point intended to have been raised on the part of the defendant, in case our opinion had been against him on this point. But as to that point, after consulting Master Walker respecting the circumstances attending this taxation, we think that he substantially examined into the facts, and that the defendant is not entitled to the rule on that ground; and therefore so much of the costs of the rule as belong to that part of it must be paid by the defendant.

There is no doubt that the costs of all interlocutory proceedings in a cause, not otherwise specially provided for by the Court, are, according to the practice of the Court, costs in the cause; and this we have had certified to us by the Masters of all the Courts, to whom we have applied. But there are two objections to applying that rule to the present case. The first is, that, strictly speaking, there has been no interlocutory proceeding here, for the defendant

has only applied for a conditional rule, and, being ultimately dissatisfied with the conditions imposed by the Court, has declined to act upon it : and this, as the Court have already determined, he had a right to do. The venue which he sought to change has remained unchanged, and the cause has been tried according to the original state of the declaration. But, secondly, we think these costs, incurred by the plaintiff in preparing for trial, have been specially provided for by the Court, for the Court made the payment of them a condition precedent to the defendant's acting upon the rule ; and it is only because the plaintiff has committed a default in not enforcing her rights, as secured to her by the terms of the offered rule, that she is in the present difficulty. If she had persisted, as she well might, in trying her cause, until the defendant had paid those costs, the present question could not have arisen ; and it is obvious that if the Court, instead of the terms proposed, had made the defendant's rule absolute for change of the venue, declaring the costs incurred by the plaintiff in preparing for trial to be costs in the cause, the plaintiff would have complained, and with great justice, of such decision. However much, therefore, we regret that the defendant obtains an apparent advantage, from the unfortunate trust which the plaintiff put in his good faith, and which has not been, it should seem, kept with her ; yet, inasmuch as these costs are not, in our judgment, costs in the cause, we must make this rule for reviewing the Master's taxation absolute. The result will be, that the Master will tax for the plaintiff the costs of the former rule drawn up by the defendant, though not acted upon, and the costs of that taxation also, which he has unnecessarily caused the plaintiff to incur, and also so much of the costs of the affidavits on this rule as are applicable to the question of reviewing the taxation of the costs, on the ground of Master Walker's supposed omission to inquire into the bona fides of the plaintiff in bringing up her witnesses to town. But the Master

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must disallow the costs of those witnesses, as they were specially provided for by the former rule, and lost by the plaintiff's own neglect.

Rule absolute accordingly.

SEWELL v. RABY.

By the deed of consecration of a chapel, built by subscription, of which the plaintiff was one of the founders, the chapelwardens for the time being were to receive the pew-rents, the surplus of which, after payment of certain expenses, was to go towards the re-payment of the expense of building the chapel. S. and G., the chapelwardens for 1838, at the close of their year of office, had in their hands a surplus of 22*l.*, payable to the plaintiff as one of the founders. The plaintiff and defendant were the succeeding chapelwardens. G. handed over the money to the defendant, together with his accounts, with a direction not to pay it over to the plaintiff until the determination of an action against the plaintiff by another of the founders, to recover back money advanced towards the plaintiff's share of the expenses of building the chapel:—*Held*, that the plaintiff could not sue the defendant for the amount, as money had and received to his use, before the determination of that cause.

DEBT for money had and received, and on an account stated. Plea, *nunquam indebitatus*.—At the trial before *Maule*, B., at the last Liverpool Assizes, the facts appeared to be as follows:—

In the year 1831, a subscription was entered into for the purpose of building a new chapel at Tranmere, in Cheshire. The plaintiff, a gentleman residing there, was one of the principal promoters of the undertaking, and the land purchased for the purpose was conveyed to him and four other persons as trustees. By the deed of consecration, dated the 15th of October, 1831, two of the trustees, Messrs. Walker and Warrington, were appointed wardens of the chapel until the following Easter, and provision was made for the future election of wardens by the proprietors of pews; and it provided, that the occupiers of pews should pay the rents to the wardens for the time being, who were to provide, out of such rents, for payment of the salaries of the minister and clerk, of the expenses of repairs, &c. &c.; and subject thereto, the founders of the chapel were authorized to let the pews to inhabitants of the township of Tranmere, in order ultimately to repay the expense of building the chapel, and, in the meantime, legal interest upon the sums advanced for that purpose. In December, 1838, the then chapelwardens,

Messrs. Sibson and Gilbert, stated their account as to the pew-rents, by which it appeared that, after providing for the several payments directed by the deed of consecration, there remained in their hands the sum of 22*l.* 18*s.* 4½*d.*, due to each of three of the trustees, of whom the plaintiff was one. They tendered this balance to the plaintiff, but he then declined to receive it until the determination of an action then pending, which had been brought against the plaintiff by his co-trustee, Warrington, for money advanced by him for the plaintiff towards the building of the church. In March, 1839, Sibson and Gilbert went out of office, and were succeeded as wardens by the plaintiff and defendant. Gilbert, however, did not then pay the money to the plaintiff, but handed it over, together with the accounts, to the defendant, desiring him to retain it in his hands until the determination of the action of *Warrington v. Sewell*; and the defendant having accordingly refused to pay it over to the plaintiff, the present action was brought. The writ of summons was sued out while a rule nisi for increasing the damages in the cause of *Warrington v. Sewell* (which was tried at the Cheshire Spring Assizes, 1839) was pending.

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On these facts it was objected, for the defendant, that the money was not received by the defendant to the use of the plaintiff, but to the use of Gilbert until the determination of the action of *Warrington v. Sewell*, and that the plaintiff ought to be nonsuited. The learned Judge reserved the point, and a verdict was taken for the plaintiff, damages 22*l.* 18*s.* 4½*d.*, leave being reserved to the defendant to move to enter a nonsuit.

Cresswell, in Michaelmas Term, obtained a rule accordingly; against which,

Alexander and Cowling now shewed cause.—The plaintiff is entitled to retain the verdict. By the account stated in December, 1838, Sibson and Gilbert clearly admitted that

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they had in their hands this precise sum of money, to be paid to the plaintiff, and which they had then appropriated to him. Gilbert could, after that, have had no defence to an action against him by the plaintiff for the amount, supposing the plaintiff to have got rid of the tender by a subsequent demand. Then, when the defendant received the money from Gilbert, he could stand in no better situation than him. The plaintiff, therefore, could equally maintain the action against the defendant, after a new demand. The defendant received the money, knowing it to be the plaintiff's; he thereby became his agent, and was bound to account to him, and cannot set up the *jus tertii*. Gilbert had no right to exercise any control over the subsequent disposition of the money, which he had admitted to be the plaintiff's, and had no authority to subject it, in the defendant's hands, to the condition of not paying it over to the plaintiff until a certain event. [*Alderson*, B.—Whose agent was the defendant? He might become the plaintiff's agent to pay over the money after the determination of the action, but not till then. Lord *Abinger*, C. B.—If I tender money to a creditor, who refuses to receive it, and I then pay it to a banker, telling him to keep it until a certain event, is the banker liable ever to my creditor?] But here the plaintiff received it with the knowledge that it belonged absolutely to the plaintiff. At all events, it was a question for the jury what was the meaning of the direction by Gilbert to the defendant; it might be merely by way of caution. [*Gurney*, B.—It is a command, not a caution.] It could not properly be so, because Gilbert had no longer any control over the money, which he dismissed from his hands in consequence of his ceasing to be the warden, and the defendant's becoming so. The rule laid down by *Willes*, C. J., in *Scott v. Surman* (a), is, "that if a man receive money which ought to be paid to another, or to apply to a particular purpose, to which he

(a) *Willes*, 404.

does not apply it, this action will lie as for money had and received." *Barron v. Husband* (a), and that class of cases, where there is no privity of contract whatever, are altogether different from the present: here, the defendant was as much the agent of the plaintiff as of Gilbert.

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Cresswell and *Crompton*, contra, were stopped by the Court.

LORD ABINGER, C. B.—This case is too clear to admit of any doubt. No doubt, where a party has an interest in a *specific chattel*, if it be handed over to a third person, he may follow it in an action of trover; but this is merely the case of a debt; there is no specific coin in the hands of either party belonging to the plaintiff. Then Gilbert pays over the money with a special charge, and the defendant receives and holds it subject to that condition; and until the event were determined, the plaintiff could have no right to receive it. The rule must therefore be absolute.

ALDERSON, B.—If the plaintiff seeks to fix the defendant as his agent by the contract made by the defendant with Gilbert, he must take it with all its consequences. If, therefore, the plaintiff agreed to the defendant's receiving the money on the terms imposed by Gilbert, he must fail, because he has brought his action too soon; if Gilbert paid the money over without authority, the plaintiff equally cannot succeed, because he ought to have sued Gilbert, and not the defendant.

GURNEY, B., concurred.

Rule absolute.

(a) 4 B. & Adol. 611; 1 Nev. & M. 728.

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CALLAND v. LOYD and Others.

A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest:—*Held*, that the bankers were liable to A. for the amount, in an action for money had and received.

ASSUMPSIT for money had and received, and on an account stated. Plea, non assumpserunt.—At the trial before *Maule*, B., at the last Liverpool Assizes, the facts appeared to be as follows:—

The plaintiff was a warehouseman at Manchester, and had married, in June, 1836, the widow of one James Birch, by whom she had an only child, Robert Birch. In February, 1837, the father of the plaintiff's wife died, having made a will, under which the plaintiff became entitled to receive her share of his property, amounting to 373*l.*, and which was paid to the plaintiff in August, 1837. He deposited 300*l.* of the money in the bank of Messrs. Heywood & Co. at Manchester, and gave the rest to his wife to take care of. On the 28th of August, the wife, without the plaintiff's knowledge, took a 50*l.* Bank of England note, part of this 73*l.*, and on the same day paid that amount into the bank of the defendants, Messrs. Jones, Loyd, & Co., in the name of her son; and the defendants gave her an accountable receipt in his name, bearing interest, which she kept. Robert Birch, the son, was at that time about twelve years old. The plaintiff, having discovered the deposit of the note with the defendants, demanded the money from them; and on their refusal to pay it, the present action was brought. It was contended for the defendants, that they having received the money upon a contract, whereby they were to be accountable for it to the infant, Robert Birch, the plaintiff could not recover it as money had and received to his use. The learned Judge overruled the objection, but gave the defendants leave to move to enter a nonsuit; and a verdict having been found for the plaintiff, *Tomlinson*, in Michaelmas Term, obtained a rule nisi, pursuant to the leave reserved; against which,

Cresswell and *Addison* now shewed cause.—The plaintiff is clearly entitled to recover in this action. The fact that this money was placed in the hands of the defendants by a person having no right to do so, and her taking the receipt in the name of another, cannot affect the plaintiff's title to sue for it. If this had been a specific chattel, and the wife, without the husband's authority, had delivered it to the defendants, and obtained from them an acknowledgment that it was held for a third party, would that be any answer to an action of trover at the suit of the plaintiff? The note deposited is admitted to be the plaintiff's property; he might have sued in trover, if he could identify it; if not, he has equally a right to sue for money had and received; and the promise of the defendants, to hold it for another person, cannot exonerate them from responsibility to the real owner. [Lord *Abinger*, C. B.—Suppose a man had money in his hands to pay to a particular person, and he paid his own debt with it; could the owner bring money had and received?] Perhaps not; but this is a different case: here the money is placed in the hands of parties having no title to it, they agreeing to hold it for the benefit of another party having no title; in such case the real owner may recover it. *Down v. Halling* (a), (the authority of which is unimpeached upon the point for which it is now cited), is expressly in point. There the owner of a cheque, who had lost it by accident, was held to be entitled to recover the amount of it back, as money had and received, from a shopkeeper to whom, five days after the loss, it had been paid by a third party in payment for goods sold, the jury having found negligence in the defendant. [Lord *Abinger*, C. B.—There the cheque remained the plaintiff's property when in the hands of the defendant, and might have been recovered in trover. *Alderson*, B.—Is there any evidence here of the identity of the note? Is

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(a) 4 B. & Cr. 330; 6 D. & R. 455.

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there anything to shew that the wife might not have changed it and got money for it, and paid in the money?] Even assuming that she did, the defendants can have no right to retain it; she had no power to make any contract on behalf of her son; he could give her no authority to do so, and he alleges no title of his own to the money. The defendants not having any title in themselves, nor claiming to hold for another who has title, the law implies a contract to repay the money to the real owner. [Lord Abinger, C. B.—If the wife had paid in the money in her own name, the husband clearly could recover: if she paid it in as the agent of A. B., he could not; then, if she pay it in, assuming to be the agent of A. B., but not being so in fact, the question is, can the husband recover, the defendants having made a contract?] The fallacy is in supposing that there is any binding contract; in order to establish that, the defendants must shew that the party depositing was competent to contract with them. *The plaintiff*, the real owner, has never authorized the defendants to receive the money to Birch's use. *Stephens v. Badcock* (a), which may be cited on the other side, is clearly distinguishable, on the ground that there the defendant received the money as the servant and agent of his master, to whom alone he could be accountable for it. But *Stead v. Thornton* (b), there cited, is a distinct authority for the plaintiff. There it was held, that a party having money in his hands which he received on account of a bankrupt's estate, in the character of agent to a former assignee, who was insane when the money was received, must account for it as money had and received to the new assignee, since he could not derive any authority from a party who was incompetent in law to appoint any agent. Here the defendants could have no authority from the infant; they receive, therefore, merely as strangers.

(a) 3 B. & Adol. 355.

(b) 3 B. & Adol. 357, n.

Sims v. Brittain (a) was a similar case in principle to *Stephens v. Badcock*, and was decided on the same ground. If the plaintiff here had assented to the defendants' entering into a contract to hold for Birch, that case would be applicable to the present. The plaintiff is not bound to shew that trover would lie, but if it would, he may waive the tort, and sue for money had and received; per Lord *Tenterden*, C. J., in *Buchanan v. Findlay* (b). In *Clarke v. Shee* (c), it was expressly held that an action for money had and received would lie by the true owner of money or notes, against a third person into whose hands they had come *malâ fide*, provided their identity could be traced and ascertained; in which case, therefore, trover would have lain also. The defendants, if called upon for payment by the infant, could have set up the plaintiff's title as a defence: *Solomons v. Bank of England* (d). In *Hudson v. Robinson* (e), Lord *Ellenborough* says, "An action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another." That clearly includes the present case.—They referred also to *Collins v. Martin* (f), and *Littlewood v. Williams* (g).

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Tomlinson, contra.—It is not necessary, on behalf of the defendants, to argue upon what would have been the case if this had been an action of trover. The plaintiff has elected to sue upon an implied contract for money had and received; if that implied contract have been superseded by an express contract with another person, he cannot recover. The cases of *Down v. Halling*, *Gill v. Cubitt* (h), and others, relating to the recovery of lost or stolen secu-

(a) 4 B. & Adol. 375; 2 Nev. & M. 594.

(b) 9 B. & Cr. 747; 4 Man. & R. 593.

(c) Cowp. 199.

(d) 13 East, 135.

(e) 4 M. & Selw. 478.

(f) 1 Bos. & P. 648.

(g) 6 Taunt. 277.

(h) 3 B. & Cr. 466; 5 D. & R. 324.

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rities, have been much narrowed by later decisions; and the rule now is, that such gross negligence must be shewn as is evidence of mala fides in the person receiving them: *Crook v. Jadis* (a), *Backhouse v. Harrison* (b). Here, so far as the defendants are concerned, all fraud is excluded; the only fraud alleged is in the conduct of the wife. This must undoubtedly be taken to have been the plaintiff's money when paid in by her, although it may be observed, that she was the meritorious cause of his becoming possessed of it, and would have been entitled to a settlement in equity. But then the defendants have entered into a contract with a third party, by which they are bound to pay the money over to him, and that express contract supersedes the implied contract on which the plaintiff relies. [Lord Abinger, C. B.—That is the pinch of the case; can you satisfy us that there is a binding contract to pay it over to the infant?] They give an accountable receipt in his name. A contract made by another for the benefit of an infant is binding. Supposing him not to receive the money until he comes of age, if he then adopt the contract, the plaintiff may have a remedy against him; but would the defendants have any defence to an action by him? [Lord Abinger, C. B.—This is not a contract made for the benefit of the infant, but a fraudulent gift made to him.] Whosever money it is in fact, if a banker bonâ fide, on the representation that it is the money of A. B., enter into a contract to pay it to A. B., he is bound by that contract. The true principles of law, as to the situation of a banker, are laid down in *Sims v. Brittain* and *Sims v. Bond* (c). In the former case, Parke, J., in delivering the judgment of the Court, says—"Although the concurrence of one of the plaintiffs was necessary to enable the defendants to receive the money from the East India Com-

(a) 5 B. & Adol. 909; 3 Nev. & M. 257.

(b) 5 B. & Adol. 1098; 3 Nev. & M. 188.

(c) 5 B. & Adol. 389; 2 Nev. & M. 608.

pany, yet it was received by the defendants as the agents of G., and they by such receipt became accountable to him for it." In *Carr v. Carr* (a), Sir W. Grant, M. R., held that money paid into a banker's was not a deposit, but became a *debt* to the payer, and would pass as such under his will. [Lord Abinger, C. B.—It is rather a fallacy to put forward a defence for the defendants as *bankers*; they appear rather trustees for the infant: he cannot draw a cheque till of age.] But he may bring an action. It is the same as if A. intrusted his money to B., who opened an account with it in his own name at a banker's, the banker acting *bonâ fide*. *Clarke v. Shee* is distinguishable, because there the money was received *malâ fide*, the contract on which it was received being avoided by statute. [Alderson, B.—That is, there was no contract: is there any here?] Yes, a contract made by the wife on behalf of the infant, to whom the defendants have attorned.

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LORD ABINGER, C. B.—This rule was granted on the supposition that some contract existed, by which the defendants, the bankers, were bound to pay over this money to another person than the plaintiff. There is no doubt, that if I pay money to A., who pays it to his banker to his own account, without notice, I cannot recover it from the banker; and for some time I doubted whether there was not in this case a lawful contract to bind the defendants. [His Lordship stated the facts of the case, and proceeded] :—The question is, whether the bankers, when the plaintiff has given them notice that it is his money, have a right to set up the *jus tertii*. The answer is, that there is no *jus tertii*: it is admitted that the money is the plaintiff's, and the defendants are merely setting up an unlawful title in answer. If this were allowed, it

(a) Cited, 1 Mer. 541.

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would be a recipe for every woman who gets possession of her husband's money, to go and make a provision out of it for her minor children. The case set up for the defendants is answered by this, that there is no contract to bind them. The wife was not the agent of her husband, nor had she any right to make a deposit for the infant, who could give her no authority. It is preposterous to suppose, that although the son can have no right to receive the money when he comes of age, nor can draw a cheque in the meantime, yet the bankers have a right to keep it from the true owner for nine years. I am of opinion, therefore, that there is no colour for making the rule absolute.

ALDERSON, B.—I am of the same opinion. If the money had been received by the defendants under a contract, I am not prepared to say that the plaintiff could recover; but, in truth, there is no contract with the defendants on behalf of Birch.

GURNEY, B., concurred.

Rule discharged.

WILLIAMS v. GRIFFITH.

After action brought upon an attorney's bill containing any taxable item, the Court will refer it to taxation, without requiring from the defendant an undertaking to pay the amount found on taxation to be due, or imposing any other terms upon him.

THIS was an action on an attorney's bill.—After the declaration was delivered, and before plea pleaded, *Crompton*, for the defendant, obtained a rule to shew cause why the plaintiff's bill of costs should not be referred to the Master for taxation, and why the plaintiff should not give credit upon oath for all sums received by him from or to the use of the defendant, without the defendant's being required to enter into the usual undertaking. It appeared from the affidavits that part of the bill was of above six years' date. The bill contained several items for business done in actions in this Court.

Jervis and *Welsby* shewed cause.—The defendant is not entitled to this rule. The application is made on the authority of *Watson v. Postan* (a), in which this Court held, that after an action brought on an attorney's bill, the Court or a Judge may order it to be taxed, without requiring from the defendant an undertaking, pursuant to the statute 2 Geo. 2, c. 23, s. 23, to pay the amount taxed. That case is not very fully reported, and it does not appear whether the bill there contained any taxable item or not. The Court proceeded upon the ground that they had a jurisdiction at common law over the taxation of attorneys' bills, independently of the statute; and the same was laid down in *Wilson v. Gutteridge* (b). But in *Dagley v. Kentish* (c), (which was decided before, though not cited in, *Watson v. Postan*), the Court of King's Bench expressly refused, even after action brought on an attorney's bill, which contained no taxable item, to send it for taxation. The authority of that case appears to have been admitted in *Jones v. Bywater* (d). And it is now settled by many subsequent cases, that the Courts have no authority to refer a bill for taxation, at least before action brought, except under the provisions of the statute: *Clutterbuck v. Combes* (e), *Ex parte Bowles* (f), *Doe d. Palmer v. Roe* (g). And there can be no reason why the attorney should be in a worse condition, after the defendant has neglected to pay the bill within the month, and driven him to commence an action. If the Court, then, have no jurisdiction but under the statute, they must carry out all the terms of it, and require the undertaking mentioned in it. But at all events, the plaintiff ought to have the security which

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(a) 2 C. & J. 370.

(e) 5 B. & Adol. 400; 2 Nev. &

(b) 3 B. & C. 158; 4 D. & R. M. 209.

736.

(f) 1 Bing. N. C. 632; 1 Scott,

(c) 2 B. & Adol. 413; 1 Dowl. 583.

P. C. 381.

(g) 4 Dowl. P. C. 95.

(d) 2 C. & J. 371.

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existed before the statute, as stated by Mr. Tidd (a), viz. that the amount of the bill should be brought into Court. [Alderson, B.—There are many cases in equity as to the power of the Courts over solicitors and their bills, but none of them are referred to in *Dagley v. Kentish*.] Mr. Tidd refers to an anonymous case, 2 Ves. 451, in support of the position above stated.

Cresswell and *Crompton*, contra.—The rule as to the authority of the Courts in such a case as this, was laid down long before the passing of the 2 Geo. 2, c. 23, in *Springett v. Springett* (b), where it is said, that there shall be no rule to tax an attorney's bill, *unless* an action be depending thereon; and the reason is, that, after action brought, the Court have jurisdiction over the *cause*, and may do in it what appears to them reasonable and just. There is nothing to shew that, as a condition of such taxation, the defendant is to be deprived of any defence he may have to the action. According to the present practice, the Courts do not permit the reasonableness of the bill to be inquired into at *Nisi Prius*. It would be most unjust, therefore, that the defendant should be deprived of the opportunity of such an inquiry before the Master, or should have it only on the condition of giving up some defence. The practice at *Nisi Prius* could never have been supported, unless the items of the bill could have been investigated before. *Dagley v. Kentish* is distinguishable, because there the bill contained no taxable item, and the defendant might have gone into the items at *Nisi Prius*. There is no case which impugns the authority of *Watson v. Postan*, and that case is directly in point for the defendant. [Alderson, B.—The case of *Dagley v. Kentish* may perhaps stand, on the ground that there the bill contained no taxable item, and was therefore on the same footing as a trades-

(a) 1 Tidd's Prac. 325.

(b) 1 Salk. 332.

man's bill : the officers of the Court would have no peculiar knowledge on the subject of it. It is important that there should be a settled practice on the subject, and we will therefore take time to consider the point, and confer with the other Courts.]

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Cur. adv. vult.

On a subsequent day in the term,

ALDERSON, B., said—We have conferred with the other Courts upon this case, and on consideration have come to the conclusion, that the rule laid down in the case of *Dagley v. Kentish* should be adhered to in all cases where the bill contains no taxable item; but that where the bill contains taxable items, the Court have authority, after action brought, to refer it for taxation, without requiring any admission of liability on the bill, or calling upon the defendant to abandon any defence which he may have at *Nisi Prius*. If the question were *res integra*, we should have been much disposed to have decided otherwise even in the case of *Dagley v. Kentish*; but as it is, we adhere to that decision.

PARKE, B., who was not present during the whole of the argument, added—The constant practice, ever since I have been in the profession, has been in accordance with the rule now laid down: and it would be the utmost hardship on the defendant if it were otherwise, because he is precluded from disputing the items of the bill at *Nisi Prius*.

Rule absolute.

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LEGG v. EVANS and WHEELTON.

Property held by a party in right of a lien cannot be taken in execution.

In *trover*, the declaration alleged that the plaintiff was lawfully possessed of the goods "as of his own property;" and the replication, in answer to a special plea in justification, set up a right to the possession of them in respect of a lien:—*Held*, that this was not a departure.

TROVER against the defendants, as sheriff of Middlesex, to recover the value of certain pictures and picture-frames, of which the declaration stated that the plaintiff was "lawfully possessed as of his own property."

Plea, that before the defendants converted and disposed of the said goods and chattels, one William Thompson had sued out of the Court of her Majesty the Queen, before the Barons of her Exchequer at Westminster, a writ of *fieri facias*, directed to the sheriff of Middlesex, commanding him of the goods and chattels of the plaintiff, to levy, &c.; and that by virtue of that writ they the defendants, being such sheriff as aforesaid, seized and took in execution the said goods and chattels, for the purpose of levying the monies so directed to be levied, which was the conversion in the declaration mentioned.

Replication, that before the said time when &c. in the declaration mentioned, to wit, on &c., one David Williams, being then lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned, delivered the same to the plaintiff, for the purpose of the plaintiff, in the way of his trade of a carver and gilder, which he then carried on, performing certain work and labour upon the said goods and chattels, and supplying certain materials for the same; and the plaintiff then had and received the said goods and chattels for the purposes aforesaid, and in the way of his said trade or business then performed upon the said goods and chattels certain work and labour, and supplied certain materials for the same; in respect of which said work, labour, and materials, the said D. Williams then became and was, and from thence hitherto has been, and still is indebted to the plaintiff in a large sum, to wit, 311*l.* 13*s.* 5*d.*: and the plaintiff further says, that after the said goods and chattels were so delivered

to him as aforesaid, and whilst they remained in his possession, and before the said time when &c., to wit, on &c., it was agreed between the plaintiff and the said D. Williams, that, in consideration that the plaintiff, at the request of the said D. W., would draw and indorse for the use of the said D. W., certain bills of exchange, the plaintiff should have a right to hold the said goods and chattels for securing the payment by the said D. W. of such bills of exchange: and the plaintiff says, that afterwards, in pursuance of the said agreement, and before the said time when &c., to wit, on the respective dates of the said bills in that plea after mentioned, he the plaintiff, at the request of the said D. W., and for his use, drew and indorsed certain bills of exchange, to wit, &c., (setting out three bills drawn by the plaintiff upon and accepted by the said D. W., for the several sums of £55, £50, and £40, and payable to the order of the plaintiff, one at two, and the other at three months after date respectively), which said several bills, from the time they were so drawn and indorsed as aforesaid continually until the said time when &c., remained and still remain wholly unpaid by the said D. W.: and the plaintiff further says, that from the time the said goods and chattels were delivered to the plaintiff as in that plea aforesaid, until the conversion thereof in the declaration mentioned, the said goods and chattels remained in the possession of the plaintiff, and that he the plaintiff, before and at the said time when &c., had, and but for the said conversion thereof would still have had, a lien upon the said goods and chattels for the aforesaid sum so due to the plaintiff for the said work, labour, and materials, and a right to hold the said goods and chattels for securing the payment by the said D. Williams of the said bill of exchange: and the plaintiff in fact further says, that by means of the premises in this plea mentioned, and of the said lien and right to hold the said goods and chattels, and in no other manner whatsoever, the plaintiff, at the time

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of the said conversion of the said goods and chattels as in the declaration mentioned, was possessed of the said goods and chattels as in the declaration also mentioned; of all which premises in this plea aforesaid the defendants, before and at the time they seized and took in execution the said goods and chattels as in the said plea alleged, had full notice.—Verification.

Special demurrer, assigning for cause, that the replication was a departure from the declaration; that it did not appear that the plaintiff had, by reason of the conversion, sustained any damage for which an action was maintainable, or that the sheriff, by seizing the goods, had deprived the plaintiff of his lien thereupon.

Kennedy, in support of the demurrer.—The question is, whether the sheriff is justified in seizing in execution property in which a party has a lien. There is no precedent for seizing property of that description; but there are cases analogous in principle, and which shew that it is no objection that a party has only a limited interest, and not the sole property in the goods. Thus, it has been held that a sheriff is justified in seizing partnership property, on a judgment and execution against one of the partners: *Heydon v. Heydon* (a): though the execution creditor takes only the interest of that partner in the property, which interest is his share of the surplus, subject to all the partnership accounts: *Dalton v. Morrison* (b), *Taylor v. Fields* (c). So, a sheriff may take goods which have been let to hire for a term: *Dean v. Whittaker* (d), *Duffell v. Spottiswoode* (e). And although the owner of the goods may maintain an action on the case against him if he sells the entire property of such goods, that is only in case the owner, as soon

(a) 1 Salk. 392.

(c) 14 Ves. 396.

(b) 17 Ves. 193; 1 Rose, 213.

(d) 1 C. & P. 347.

(e) 3 C. & P. 435.

as the goods are seized, apprizes the sheriff that the goods were lent for a term only, in order that he may know that the sheriff had only a right to sell the qualified property which the hirer had in them. And in *Duffell v. Spottiswoode*, it was held that the action is not maintainable if it appears that the sheriff has not sold, which was the case here. A person who hires goods has a qualified right to the possession of them for a limited time only; and the same right exists in the case of a lien, where the party entitled to the lien has a right to retain the chattel only until the debt is satisfied. The sheriff was therefore right in seizing the goods in question. But, secondly, the replication is bad, as being a departure from the declaration. The declaration alleges that the plaintiff was possessed of the goods as of *his own property*; but the replication sets up a mere right to the possession on the ground of having a lien on them, which is a departure from the declaration.

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Mellor, contra.—It is a general principle of law that a sheriff can seize such chattels only as he can sell: Com. Dig. Execution (C. 4.) Before the recent stat. 1 & 2 Vict. c. 110, a sheriff could not seize money or bank-notes, bills of exchange, &c., or other securities for money; but, by the 12th section of that act, he may now do so. The law of lien, however, remains as it was before the passing of that act. A lien is a right in a person to hold the possession of property until his demand be satisfied; but as soon as the holder parts with or relinquishes the possession of the property, the lien ceases to exist: Montague on Lien, 1. A person entitled to a lien cannot sell the subject-matter of it, except where the keeping of the property is attended with expense, as in the case of a horse. Thus, in the *Hostler's case* (a), it is said by Popham, C. J., "that

(a) Yelv. 66.

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if a man brings his horse to an inn, and leaves him there in the stable, without any special agreement what to pay, there the innholder is not bound to deliver the horse till the party and owner has defrayed his charge for the horse, but he may justify the detainer of the horse for his food and keeping; and after the horse has eat as much as he is worth, the innholder, upon a reasonable praisement, may sell him, and it is a good sale in law." . . . "So, if a tailor has my apparel to make, and he makes it accordingly, he is not obliged to deliver it until he is paid for the making of it; but although in that case he may detain till he is paid, yet for default of payment he cannot sell it, as in the other case he may sell the horse: the reason is, because the keeping of the horse is a charge, because he eats; but the keeping of the apparel is not any charge. And this the whole Court agreed to." There is a distinction between a pledge of goods by way of security, and the ordinary case of lien: in the former case, the pawnee may sell in default of payment. That was so held by *Gibbs*, C. J., in *Pothonier v. Dawson* (a): but the distinction between that and the case of lien was distinctly recognised. The Chief Justice says—"Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods; but when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge: the lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade." In *Jacobs v. Latour* (b), it was held that a party who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off the premises. [*Parke*, B., referred to *Capper v. Dickinson* (c), where it was held that a pawnee might sell goods pawned to him.]

(a) Holt's N. P. C. 383.

(b) 5 Bing. 130; 2 M. & P. 20.

(c) 1 Roll. Rep. 215.

In Com. Dig. tit. Execution (C. 4.) it is said, "So, the sheriff cannot take goods in pledge." It is laid down distinctly in the books of practice, that a sheriff cannot seize what he cannot sell (a). A lien is a mere personal right, which cannot be made available to any other person; for as soon as the possession is parted with by the person having the lien, it is gone altogether: it is clear it is not assignable. Unless it can be shewn that a lien can be made available to a third person, it follows that it cannot be seized in execution. Then, as to the replication being a departure, surely a person having this right might declare in trover, alleging a general property, and yet, on a subsequent pleading, set up a special property, sufficient to maintain trover: it is not inconsistent with, but explanatory of, his interest. [*Parke, B.*—It is not a departure. Any person having a right to the possession of goods may bring trover in respect of the conversion of them, and allege them to be his property.]

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Kennedy, in reply.—The dicta in the books which have been cited refer to property of such a nature as to be incapable of sale—as, for instance, bank-notes, money, &c.; but here the subject-matter of the lien might be sold. Even if the sheriff had no right to sell under the particular circumstances, he had power to seize and retain the goods, with a view to compel the payment of the debt.

PARKE, B.—The general rule of law is, that the sheriff can seize only such things as he can sell. That rule of law still remains, except so far as it has been modified by the act of 1 & 2 Vict. c. 110; but that statute does not affect the present case. If we consider the nature of a lien, and the right which it confers, it will be evi-

(a) See 2 Tidd's Prac. 1003; Chit. Archb. 426.

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dent that it cannot form the subject-matter of a sale.

A lien is a personal right, which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods. The case is quite different from those referred to, in which goods were let on hire for a certain period, because there the person hiring them has the absolute use of the goods for a particular term, and that interest may be disposed of. Here, the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant. Then, as the sheriff cannot sell, neither, by the general rule of law, can he seize: and there must, therefore, be judgment for the plaintiff.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

PETERS v. FLEMING.

To a declaration for goods sold, &c., the defendant pleaded his infancy, to which the plaintiff replied that the goods were *necessaries* suitable to the degree, estate, and condition of the defendant:—*Held*, that the term *necessaries* included such things as were useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence.

It is a question for the jury, whether the articles are such as a reasonable person, of the age and station of the infant, would require for real use.

THIS was an action of debt for goods sold and delivered, work and labour done, and materials found and provided, and for money found to be due upon an account stated. The defendant pleaded, first, *nunquam indebitatus*; secondly, infancy. The plaintiff took issue on the first plea, and to the second replied, "that the goods, &c., at the time of the sale and delivery thereof, were *necessaries*

suitable to the then degree, estate, and condition of the defendant." The rejoinder traversed that allegation, and thereupon issue was joined.

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The cause was tried before *Vaughan*, J., at the last Summer Assizes for the county of Cambridge, when it appeared that the action was brought to recover the amount of the following articles:—

A fine gold ring	-	-	-	-	£1	8	0
A ring, engraved crest, &c.	-	-	-	-	0	18	0
A short gold watch-chain	-	-	-	-	2	2	0
A pair of pins	-	-	-	-	0	18	0
A ring	-	-	-	-	1	6	0
A ring	-	-	-	-	1	5	0
A ring repaired, new stone	-	-	-	-	0	3	6
					£8	0	6

The defendant was the eldest son of a gentleman of fortune and a member of Parliament, and at the time when the goods were supplied, and the work was done, was an undergraduate of the University of Cambridge, and resided in the University. The learned Judge left it to the jury to say whether, in their opinion, the articles in question were necessities or not, and they found that they were; upon which the learned Judge directed them to find a verdict for the plaintiff for the full amount claimed; but gave the defendant leave to move to enter a nonsuit. *Biggs Andrews* having, in last term, obtained a rule accordingly, or for a new trial,

Kelly and *Byles* now shewed cause.—The case was properly left to the jury, and they have come to a correct conclusion in finding that the articles in question were necessities for a person in the defendant's station in life. If things of such a nature are necessities in any case, they certainly must be so for the son and heir of a gentleman

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of fortune and a member of Parliament. The jury are the proper judges whether the quality or nature of the ornaments supplied are suitable to the defendant's rank in life. *Hands v. Slaney* (a) is an authority to shew that the term "necessaries" is not limited to the bare necessities of life, but extends to such things as are necessary according to the station and degree of the party; and it was there held, that a minor, a captain in the army, was liable for a livery ordered for his servant, because the defendant was placed in a situation of life which required such an attendant. Lord *Kenyon* there says, "The general rule is clear, that infants are liable for necessaries according to their degree and station in life." In the present case the defendant was a person receiving a University education, and for whose position in society a watch chain and a seal would be proper and useful articles; the one to enable him to pull out his watch, the other to seal his letters to his father or his friends. The other articles were also proper for a person in his station of life. But it was a question for the jury whether these articles, or any of them, were proper and necessary for the defendant, and if any one of them was necessary, there cannot be a nonsuit; and the amount is too trifling for the Court to grant a new trial, on the ground of the verdict being against the weight of evidence.

Sir *William Follett*, *Biggs Andrews*, and *Gunning*, contra.—In this case no question ought to have been left to the jury at all, as the defendant was not competent to enter into a contract for articles of this nature, which were mere ornamental articles of jewellery. An infant is incapable of contracting for that which is not requisite for him as a matter of necessity, such as "meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his necessary teaching." Co. Litt. 172. a.

(a) 8 T. R. 578.

In *Manby v. Scott* (a), it is said: "Our law allows many persons to make contracts in cases of necessity who otherwise would be disabled from doing so; and although generally the contracts of infants are void, yet, in cases of necessity, their contract shall bind them." So, in *Brooke v. Gally* (b), Lord *Hardwicke* says: "The law lays infants under a disability of contracting debts, except for bare necessities; and even this exemption is merely to prevent them from perishing." According to those cases, an infant cannot bind himself but for such things as are strictly necessary for him. [*Parke*, B.—A watch may, in some cases, be a thing necessary. In *Burghart v. Hall* (c), it was decided that you must lay out of the question the allowance of a suitable maintenance to the infant. The only question is, whether the things themselves are necessities suitable to his station and degree, or not. It will be very difficult to maintain that the Judge can withdraw the question from the jury, whether such an article as a watch is not necessary; and if a watch be necessary, a chain must be so also, to draw it out of his pocket, for a boy of any age.] If articles of this description are to be considered as necessities, where is the line to be drawn? [*Alderson*, B.—The term "necessaries," as applied to dress, may mean those things without which the party would lose caste in society. The quantity of the things furnished may be important; as, for instance, if twenty breast-pins had been supplied, they could scarcely be necessary.] What came within the term "necessaries" was, according to the old cases, a question for the Judges; and in *Mackerell v. Bachelor* (d), cited by Lord *Ellenborough* in *Maddox v. Miller* (e), the Judges decided that some of the articles were not necessities for the defendant, and that the action would not lie for them; although certainly in *Maddox v. Miller* it was held to be not so purely and exclusively

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(a) 2 Sid. 113.

(b) 2 Atk. 34.

(c) 4 M. & W. 727.

(d) Goldsborough, 168; Cro.
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(e) 1 M. & Sel. 731.

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a question of law as that some question should not be left to the jury; but there the supply was of ordinary clothes. Here none of these articles are strictly necessaries, and there could be no difficulty in laying down a rule that an infant cannot bind himself for such things as these. If an infant wants articles of such a nature, he should be made to pay for them at the time of the purchase. The rule to be collected from the books is, that an infant can bind himself only for such things as are "necessaries," which, according to the old law, were such things as a person could not do without. [*Parke, B.*—No; it always had been the law from the first that an infant might bind himself for what was suitable to his state and degree. That was shewn in the argument in *Burghart v. Hall*. The law has always been the same in this respect.] But these articles were not even useful, they were mere ornaments, and could not be *necessary*, in the proper sense of the word, for any one.

PARKE, B.—It seems to me that in this case the learned Judge could not have been properly called upon by the defendant to nonsuit the plaintiff, and that there was some evidence to go to the jury in support of the allegation in the replication, that the goods were, at the time of the sale and delivery thereof, "necessaries suitable to the then degree, estate, and condition of the defendant." The decision of this question does not depend in any degree upon any allowance the defendant may have had from his father, and which he may have misapplied; that must be considered as settled by the case of *Burghart v. Hall*; but the question is, whether the articles furnished are properly such articles as are necessary and suitable to the station, degree, and condition of the defendant. It is perfectly clear, that from the earliest time down to the present, the word *necessaries* was not confined, in its strict sense, to such articles as were necessary to the support of life, but

extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is ; and therefore we must not take the word " necessities " in its unqualified sense, but with the qualification above pointed out. Then the question in this case is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, viz. the breast-pin and the watch-chain. The former might be a matter either of necessity or of ornament : the usefulness of the other might depend on this, whether the watch was necessary ; if it was, then the chain might become necessary itself. Now it is impossible for us to say that a Judge could withdraw it from the consideration of the jury, whether a watch was not a necessary thing for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury : there was, therefore, evidence to go to the jury. The true rule I take to be this—that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one ; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved ; if they were, for such articles the infant may be responsible. That must be a question for the jury, and it is for them to decide, upon due consideration, whether the articles were of such a description or not ; and here the jury have found that they were. It is impossible to say there was not some evidence to go to the jury in the present case : that being so, it becomes unnecessary for us to inquire as to the other matters charged for.

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ALDERSON, B.—If it were laid down strictly that an in-

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fant can make no contract except for articles that would be necessary to keep him from famishing, that would be a rule which would press very hardly indeed in many cases. But that is not the rule; for a party may make contracts for necessary clothes, and for necessary education. It has been ruled that an infant may be liable for schooling, and if it become a question how much schooling is necessary, then you must inquire what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another. The real question would be, whether or not what he has contracted for be such as a person in his station and rank in life would require. The articles must be for real use, and such as would be necessary and suitable to the degree and station in life of the infant. The question in these cases is this—Were the articles bought for *mere ornament*? if so, they cannot be necessities for any one. If, however, they are bought for *real use*, then they may be necessities, provided they are suitable to the infant's age, state, and degree. The jury then must say, whether they are such as reasonable persons, of the age and station of the infant, would require for *real use*. If so, they will be necessities, for which an infant will be liable.

GURNEY, B.—I think my Brother *Parke* has laid down the principle most correctly. If the articles are merely ornamental, the party cannot recover. What may be ornamental, and what necessary, is a question for the jury. In this case the jury have found that these articles were necessary; as to two of them, it appears to us the jury were right: and it is admitted that it is not worth while to discuss the precise amount.

ROLFE, B.—The difficulty in this case arises from the vague and uncertain nature of the word *necessary*. I think

the explanation given by my Brother *Alderson* is the best that can be given, viz. that that is necessary which is bonâ fide purchased for use, and not merely for ornament, and which consorts with the condition and rank in life in which the party moves. One of these articles, at all events, and I think two, clearly might come under that description, and therefore the matter was properly left to the jury.

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Rule discharged.

YOUNG v. HIGGON, Esq.

TRESPASS against the defendant, a magistrate of the county of Pembroke, for breaking and entering the plaintiff's dwelling-house, and seizing his goods. Plea, (by statute), not guilty.

At the trial before *Gurney*, B., at the last Pembroke-shire Assizes, it appeared that the plaintiff, having been convicted before the defendant of an offence under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, was afterwards also charged before him, under the stat. 3 Jac. 1, c. 10, with having refused to bear the charges of his conveyance to gaol under the former conviction, and the defendant thereupon issued his warrant to the constable of the parish wherein the plaintiff resided, to sell the plaintiff's goods for the purpose of satisfying such charges. The constable accordingly seized and sold certain of the plaintiff's goods for that purpose, which was the trespass complained of. It was objected for the defendant, (amongst other things), that no sufficient notice of action had been given to satisfy the stat. 24 Geo. 2, c. 44, s. 1. The notice was served on the 26th of March, 1838; the writ was sued out on the 26th of April. The learned Judge reserved the point, and a verdict was found for the plaintiff, damages 10*l.*; leave being reserved to the defendant to move to enter a non-

In the computation of the calendar month's notice of action to a justice, required by the 24 Geo. 2, c. 44, s. 1, the day of giving the notice, and the day of suing out the writ, are both to be excluded.

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suit, if the Court should think the action was brought too soon. *Evans*, in Michaelmas Term, obtained a rule accordingly; against which,

Chilton and *J. Wilson* now shewed cause.—The notice was sufficient. The enactment of the 24 Geo. 2, c. 44, s. 1, is, that “no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any Justice of the peace for anything done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, &c., at least one calendar month before the suing out or serving the same.” The true construction of the statute is, that the day of giving the notice and the day of suing out the writ are to be reckoned, the one inclusive, and the other exclusive: if so, the action was not brought too soon. The rule for computing the time in cases like the present, where it dates *from an act done*, is to include in the computation the day on which the act was done. There are many authorities to that effect: *Clayton’s case* (a), *Norris v. Hundred of Gawtry* (b), *Osbourne v. Rider* (c), *Clark’s case* (d), *R. v. Adderley* (e), *Morley v. Vaughan* (f), *Bellasis v. Hester* (g). [*Parke, B.*—The cases which refer to bills payable at sight have been long overruled.] *Castle v. Burditt* (h) is a direct authority to the same effect, decided upon a similar statute to the present. *Lester v. Garland* (i) may be referred to as a decision qualifying the former cases; but that was the case of a will, in which a liberal construction ought to be allowed. Sir *William Grant* also, in his judgment, assigns some weight to the circumstance of the party interested being privy to the act done,

(a) 5 Rep. 1.

(b) Hob. 189; 1 Brownl. 156.

(c) Cro. Jac. 135.

(d) Sty. 382.

(e) 2 Dougl. 463.

(f) 4 Burr. 2525.

(g) 1 Lord Raym. 280; Lutw. 1591.

(h) 3 T. R. 623.

(i) 15 Ves. 248.

which does not apply to this case. It has always been laid down that the Court will apply a liberal rule in favour of the right of the subject to sue for a wrong to his liberty or property. In *Zouch v. Empsey* (a), the Court certainly held that the "fourteen days at least," mentioned in the Lords' Act, 32 Geo. 2, c. 28, meant fourteen *clear* days; but the point arose on a summary application, and was decided without argument. In *Reg. v. Justices of Shropshire* (b), on the other hand, *Littledale, J.*, says, "It appears to me that a day is a day, whether *at least* be added or left out." The rule of H. T., 2 Will. 4, c. 8, expressly directs that, in all matters of practice, the computation of time is to be made with one day inclusive and one exclusive. That appears to be a recognition of that mode of computation as the reasonable and legal one. [*Parke, B.*—The whole question is, whether the case of *Castle v. Burditt* is to be considered sound law.] It has never been overruled. In *Ex parte Farquhar* (c), *Leach, V. C.*, held, that in the computation of the two calendar months mentioned in the Bankrupt Act, 6 Geo. 4, c. 16, s. 81, one of the days ought to be included; and his decision was affirmed on appeal by the Lord Chancellor. *Manners v. Bryan* (d) is another authority to the same effect. In *Bhunt v. Heslop* (e), where the Court of Queen's Bench held that the month required by the stat. 2 Geo. 2, c. 23, s. 23, for the delivery of an attorney's bill before he commence an action upon it, is to be computed exclusively of both the day on which the bill is delivered and the day on which the action is brought, the attention of the Court was not directed to the recent rule of Court above referred to. There, also, the statute requires that the bill shall be delivered "one month *or more*" before action brought.

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(a) 4 B. & Ald. 522.

(d) 5 Sim. 147; 1 Myl. & K.

(b) 8 Ad. & Ell. 173; 3 N. & P. 453.

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(e) 8 Ad. & E. 577; 3 N. & P.

(c) Mont. & M'Arth. 7.

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PARKER, B.—I am of opinion that this rule must be made absolute. The question is, was this action brought prematurely? The notice of action was given on the 26th of March, and the writ was sued out on the 26th of April in the same year. I think that was too soon. If the case of *Castle v. Burditt* is still to be considered law, then undoubtedly our judgment must be in favour of the plaintiff: but I think that, after the decisions which have since taken place, it cannot be so considered. According to the earlier authorities on this subject, whenever a period of time was to be computed from an act done, and not from a particular day, the day on which the act was done was reckoned inclusive: and on that principle the case of *Castle v. Burditt* was decided. There, in an action before the bringing of which, by the statute 23 Geo. 3, c. 70, "one calendar month's notice" was required to be given, the plaintiff gave his notice on the 28th of April, and issued his writ on the 28th of the following month; and the Court held the notice sufficient. But that case was decided without much argument, and altogether on the authority of the previous case of *Rex v. Adderley*, in which, upon the construction of the 20 Geo. 2, c. 37, s. 2, which exempts sheriffs from the obligation of returning any process unless required to do so within six months after the expiration of their term of office, the Court held that these months must be intended to mean lunar months, and that the day of the sheriff's going out of office must be reckoned inclusively in the computation of them. One of the principal grounds there assigned for the judgment of the Court was, that the statute being made for the ease and in favour of sheriffs, ought to receive a liberal construction in their favour. But since those decisions, the subject has been much considered in the case of *Lester v. Garland*, which

introduced a new view of the question. I do not say that that case is precisely in point with the present: but looking at the elaborate judgment of the Master of the Rolls, in which all the authorities are collected and commented upon, I should feel little difficulty in saying that the day in this case ought to be reckoned exclusively, on the authority of that case alone. But many others have since been decided, in which the principle of that case has been followed, viz. that when time from a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively. One of the first of these cases was that of *Pellew v. Inhabitants of East Hundred of Wonford* (a), in which, under the 9 Geo. 1, c. 22, which requires that notice of an injury done to premises maliciously set on fire, for which an action is brought against the hundred, shall be given within two days from the time of its being committed, the Court held that these two days must be reckoned exclusively of the day on which the fire happened. It is true, that is a case where the party to be affected was not privy to the act done, and therefore is within the distinction suggested in *Lester v. Garland*. Then came the case of *Hardy v. Ryle* (b), which was an action against a magistrate for false imprisonment, which, by the 24 Geo. 2, c. 44, s. 8, must be brought within six calendar months after the act committed. The plaintiff was discharged from prison on the 14th of December, and issued his writ on the 14th of June: and he was held to be within the six months. One of the reasons given for the decision in that case by *Bayley, J.*, in delivering the judgment of the Court, certainly was, that the act was one to which the plaintiff could not be considered privy. There would be considerable difficulty, however, in supporting the judgment on that ground, for a man must surely be privy to the act of his own imprisonment: the case therefore

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(a) 9 B. & C. 134; 4 M. & R.
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(b) 9 B. & C. 603; 4 M. & R.
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rests more legitimately on the general ground, that the first day is to be excluded from the computation. In *Webb v. Fairmaner* (a), in which almost all the authorities are cited, this Court held, in conformity with the decisions just referred to, that where a party bought goods to be paid for in two calendar months, the day of the sale should be reckoned exclusively in computing the time. That case has been followed up by the decisions of the Court of Queen's Bench in the two cases of *Reg. v. Justices of Shropshire*, and *Blunt v. Heslop*: so that the point may now be considered as settled by a course of recent decisions, all proceeding upon the same principle, that the day from which the computation is made ought, in cases like the present, to be excluded; and such appears to me to be the reason and good sense of the matter. On the other hand, *Castle v. Burditt* rests altogether on the authority of *Rex v. Adderley*, which I cannot help considering as overruled. Apply the criterion which has been before suggested—reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted.

ALDERSON, B.—I am of the same opinion, that the rule ought to be made absolute; on the simple principle, that where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him *the whole* of that space of time. Here is a case in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given: but the act of Parliament allows him a month, as an intervening

(a) 3 M. & W. 473; 6 Dowl. P. C. 549.

period within which he may deliberate whether he will do a certain act, viz. tender amends: and unless you exclude both the first and the last day, you do not give him a whole month for that purpose.

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GURNEY, B.—I am of the same opinion. As to the argument that this act ought to be construed liberally, so as not to be in restriction of the general right of bringing actions, I think it is rather in the nature of a benefit to the party to whom the notice is required to be given, and ought to receive a liberal construction in *his* favour.

ROLFE, B., concurred.

Rule absolute.

BLAYMIRE v. HALEY.

CASE.—The declaration stated, that one S. B., the daughter of the plaintiff, being an infant under the age of twenty-one years, to wit, of the age of eighteen years or thereabouts, and unmarried, had become and was, with the assent of her said father, a domestic servant of the defendant, at and for certain wages theretofore agreed upon, and with the intention on the part of the plaintiff and his said daughter, that she should return to her said father whenever she quitted the service of the defendant, unless she should immediately proceed to the service of some other person than the defendant or the plaintiff. The declaration then averred that, at the time of the grievance thereafter mentioned, the said S. B. was able and accustomed, and but for the committing of such grievance would have continued, to do and perform domestic services, and by means thereof to support herself without

An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person: although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father's when she quitted her service, unless she should go into another service.

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assistance from her said father while she was in the domestic service of another person, and to render great assistance to her said father while living with him. It then alleged the seduction of the said S. B. by the defendant, that she became pregnant, and returned to her father's house, and that by reason of such seduction she became unable to maintain herself, and thereby the plaintiff was charged with her support and medical expenses, and deprived of the benefit of her services &c.

General demurrer and joinder.—The point stated in the margin was, that the declaration disclosed no cause of action, it not being alleged that the daughter of the plaintiff was, at the time of her seduction, in the service of the plaintiff.

Alexander, in support of the declaration, was called upon by the Court.—Although it was formerly considered essential to the maintenance of an action of this nature, to shew acts of household service performed by the daughter for her parent, it is now clearly settled that it is not necessary to prove any distinct or actual service, in order to sustain the action. [*Parke*, B.—Still a constructive service must be proved in all cases. There is a distinct decision of *Littledale*, J. to that effect, *Maunder v. Venn*(a).] There is a sufficient allegation of constructive service in the present case; it is averred that the girl left her father's house with his consent, and with the intention on both their parts that she should return thither on quitting her service.

PARKE, B.—That averment was evidently inserted for the purpose of shewing an animus revertendi in the daughter, and so assimilating this case to those in which actions

(a) M. & M. 323.

have been held to lie for the seduction of a girl while on a visit to a friend (a). But this case is very distinguishable from those: here the girl was in the actual service of another person, and her intention was not to return at any definite time to her father's house, but only on her dismissal from her service, and in the uncertain event of her not going into another service. That an action for seduction will not lie under such circumstances, has been expressly decided in *Dean v. Peel* (b). In order to sustain this action, there must be *damnum et injuria*. The plaintiff not having shewn any right to the services of his daughter at the time of the seduction, there is here *damnum absque injuriâ*. A mere temporary absence undoubtedly would not be sufficient to defeat the action; but that is very different from a continued and regular service.

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ALDERSON, B.—I remember this very case arising on the Northern Circuit, at Newcastle, in a case in which I was concerned, about the year 1819—and the Court held that no action lay.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.

(a) *Booth v. Charlton*, and *Johnson v. M^r Adam*, cited 5 East, 47. 542. See *Harris v. Butler*, 2 M. & W.

(b) 5 East, 45.

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MORTIMER v. M'CALLAN.

Indebitatus assumpsit, in £5,000, for certain £3 per cent. stock alleged to be sold, and caused to be transferred, by the plaintiff to the defendant, and by the defendant duly accepted. Pleas

—1st, non assumpsit; 2nd, that the defendant did not accept the stock from the plaintiff. At the trial it appeared that

one T., a stock-broker, had applied to the plaintiff, a stock-jobber, for the purchase of stock to the amount of £5,000 for the defendant. The plaintiff, not having any stock of his own, applied to W., who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal were disclosed; though credit is sometimes given to the principal, and his cheque taken, where the broker's credit is not thought sufficient:—*Held*, that under these circumstances the learned Judge was right in leaving it to the jury to consider, whether the plaintiff sold the stock on the credit of T. and T. only, or on the credit and responsibility of the principal, the defendant; and the jury having found the latter, that the verdict was right:—

Held, also, that although the plaintiff was not in possession of the stock at the time of the sale or transfer, he could maintain indebitatus assumpsit for the price of it: and that the contract was not prohibited by the stat. 7 Geo. 2, c. 8, s. 8, as that only applies to fictitious sales of stock, and not to cases where the stock is actually transferred, although the seller was not possessed of it at the time of the contract.

A witness having been called to prove on the part of the plaintiff, that, immediately after the transfer had taken place, the plaintiff requested T. to give him the cheque of his principal:—*Held*, that this evidence was admissible, not as amounting to an admission, but as part of the *res gestæ*.

In order to prove the acceptance of the stock by the defendant, evidence was adduced that T., and a person unknown to the clerk in the Bank, came there with T. and made an entry of his acceptance of the stock, and a witness was then called who proved that he had inspected the Bank books, and that the signature to the acceptance of the stock was in the defendant's handwriting:—*Held*, that this evidence was admissible to prove the acceptance of the stock by the defendant, and that it was not necessary that the Bank books themselves should be produced, they not being removable on the ground of public convenience.

On the part of the defendant, several letters, containing accounts between the defendant and T., were offered in evidence to prove the existence of a debt from T. to the defendant to the amount of the stock transferred. Other evidence had been given which shewed that fact on the part of the plaintiff, and the plaintiff's counsel admitted in his reply, that the existence of the debt from T. to the defendant had been sufficiently established. The defence turned on a point collateral to this question. This evidence having been rejected:—*Held*, that rejection of it did not form a sufficient ground for a new trial.

Held, also, that the allegation in the declaration, of the acceptance of stock from the plaintiff, was sufficiently shewn, although made through the medium of W.

ASSUMPSIT.—The declaration alleged, that the defendant was indebted to the plaintiff in the sum of £5,000, for certain, to wit, £5,000 interest or share in the joint stock of £3 per cent. annuities, transferable at the Bank of England, called the Consolidated £3 per Cent. Annuities, then sold and caused to be transferred by the plaintiff to the defendant at his special instance and request, and by the said defendant, then, to wit, on &c., duly accepted. There was a second count upon an account stated.

The defendant pleaded, first, non assumpsit; secondly, as to the first count of the declaration, that the said interest or share in the said joint stock, in the first count

mentioned, and therein alleged to have been caused to be transferred by the plaintiff to the defendant, was so caused to be transferred under and by virtue of a certain contract and agreement made with the plaintiff after the 1st of June, 1734, viz. on the 7th of October, 1839, for the transfer on the day and year last aforesaid by the plaintiff to the defendant, of the said sum of £5,000 interest or share in the said joint stock in the first count mentioned, for and in consideration of the sum of 4,531*l.* 5*s.*, to be therefore paid to the plaintiff for the same. And the defendant further says, that at the time of the making of such contract and agreement, the plaintiff was not actually possessed of, or entitled unto, in his own right, or in his own name, or in the name or names of trustee or trustees to his use, of the said interest or share in the said joint stock in the said first count mentioned, or any part thereof, by means whereof the said contract and agreement, and the said promise in the said declaration mentioned, so far as the same relates to the said first count, then became and was, and from thence hitherto hath been, null and void.—Verification. The third plea alleged, that the defendant did not accept from the said plaintiff the interest or share in the said stock, as in the first count alleged.

The plaintiff took issue on the 1st and 3rd pleas, and demurred to the 2nd.

At the trial before *Gurney*, B., at the London Sittings after last Michaelmas Term, it appeared that on the 7th of December, 1839, a person of the name of Taylor, a stock-broker, applied to the plaintiff, a stock-jobber, for the purchase of stock to the amount of £5,000 for the defendant. The plaintiff, not having any stock of his own, applied to a person named Ward, who agreed to transfer stock to the defendant to the amount required, and accordingly stock, standing in Ward's name, was transferred by him to the defendant. In order to prove the acceptance of the stock by the defendant, an examined copy of the Bank

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books was produced, in which there appeared to be a transfer of that amount of stock by Ward; and for the purpose of proving the identity of the defendant with the person to whom the stock was transferred, a clerk in the Bank was called, who proved that on the day in question, a person whom he did not know came to the Bank with Taylor, and made an entry of his acceptance of the stock; and it was then proposed to shew the identity of the defendant with that person, by proving that the name in the Bank books, as acceptor of the stock, was in his handwriting. This evidence was objected to, on the ground that, in order to prove the defendant's handwriting, the Bank books themselves ought to be proved, and that if on the ground of public convenience they could not be produced, no secondary evidence of their contents could be given to prove the defendant's identity. The learned Judge however received the evidence. A stock receipt, signed by Ward, was also put in evidence, which stated that he, Ward, had received money from the defendant for the transfer of £5,000 stock. It was proved also, that after the transfer was made, a conversation had taken place between the plaintiff and Taylor, in which the plaintiff had requested Taylor to give him the cheque of his principal, when he gave his own cheque, requesting that it might not be presented till the next day. This evidence was objected to, on the ground of the conversation having taken place after the transfer was made, but the objection was overruled. The plaintiff subsequently pressed Taylor for the money, when he admitted that he had no funds at the bank on which his cheque was drawn; upon which the plaintiff summoned him as a defaulter before the committee of the Stock Exchange, when he admitted that he had for a long time owed the defendant £5,000 worth of stock, which the defendant, who had employed him in several stock transactions, had allowed to remain in his hands, on receiving an undertaking that he would replace it within a certain time. It appeared that shortly before this trans-

action, the defendant had repeatedly applied to Taylor to invest the money in Consols; and two letters were given in evidence from the defendant to Taylor, containing statements of accounts between them, and pressing for the investment. Four other letters between these parties, containing statements of accounts between them, were tendered on behalf of the defendant, but on being objected to by the plaintiff's counsel, were rejected. Taylor died a day or two after the transfer. Evidence was adduced of the course and practice of the Stock Exchange, from which it appeared that the general usage was to give credit to the broker, even although the name of the principal were disclosed, and that the reason for this was, because the principal was usually a person unknown to the seller, and one whose solvency he consequently could not know or judge of. The practice, therefore, in paying for stock was, to take in the first instance the broker's cheque for the amount, who then took that of his principal, both for the amount of the stock and for his commission. Sometimes, however, when the broker was not deemed sufficiently responsible, and the seller unwilling to give him credit, the usage was either to demand actual payment in money, or take the cheque of the principal, and to hold back the stock until the actual receipt of the one or the other, or till the broker shewed he had got them in his hands. There is also a printed rule of the Stock Exchange, declaring the broker to be the person responsible for the stock, notwithstanding any reference made by him to a third person. The learned Judge, in summing up, told the jury that, although by the regulations of the Stock Exchange the broker was the party considered liable, it did not follow that the principal might not be liable also; and he left it to them to say whether the plaintiff had ever given credit to or taken the responsibility of Taylor, or ever consented to release the defendant as the principal. The jury having found their verdict for the plaintiff for the amount claimed,—

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Sir *W. W. Follett* now moved to enter a nonsuit, or for a new trial.—First, the learned Judge misdirected the jury with reference to the question to whom credit was given. The evidence of the usage of the Stock Exchange shewed that credit was usually given to the broker, and not to the principal; and the question left to the jury ought to have been, Did the plaintiff, on the present occasion, contrary to the practice of the Stock Exchange, give credit to the principal instead of the broker? The general rule with respect to the responsibility of principal and agent is laid down in *Paterson v. Gandasequi (a)*,—that if the seller, knowing that the buyer, though dealing in his own name, is in truth the agent of another, elect to give credit to such agent, he cannot afterwards recover against the known principal; but if the principal be not known at the time of the purchase, the principal when discovered, or the agent, may be sued at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing. Now, according to the usage of the Stock Exchange, the credit here was confined to the broker, and the principal is not liable. [*Alderson*, B.—Is not the question whether he bought as principal or as agent? If a party goes into the market and buys stock as principal, the person to whom the seller afterwards transfers it cannot be liable for what he so buys. But if he goes into the market and buys as an agent, is not the principal liable when discovered?] In the case of an ordinary agency it may be so, but there is a distinction in the case of a stock-broker, by the usage of the Stock Exchange. [*Alderson*, B.—The rule as to credit being given to the broker, is a mere honorary regulation among the members of the Stock Exchange. No one can doubt but that the plaintiff took the responsibility of the principal. Lord *Abinger*, C. B.—And the question as to whom credit was given was left to the jury.]

(a) 15 East, 62.

The second objection is as to the admissibility of evidence of the handwriting of the defendant in the Bank books, for the purpose of proving that he was present at the Bank and accepted the stock. Such evidence was not admissible. If it was important to prove that fact, the plaintiff should have produced the Bank books, and proved that the signature to the acceptance of the stock was in the defendant's handwriting. In order to prove the identity of the handwriting, the document itself should be produced. The rule that an examined copy of an entry in a book of this public nature is receivable, is confined to the proof of a fact directly in issue; but where a collateral fact connected with those books is sought to be established, that principle does not apply, and the original must be produced. In the case of a marriage, that may be proved by an examined copy of the register, and by shewing the identity of the parties; but the identity of the parties would not be established by mere proof of their handwriting to the original entry. In order to prove that, it is necessary to adduce witnesses who were present at the ceremony. [*Alderson*, B.—If I want to shew that the defendant was the individual who wrote his name in the Bank books, surely I shew that by proving that it was his handwriting. Suppose, in a case of treason, it were necessary to prove that an individual was in a certain crowd at a particular place, would it not be competent to shew that at that place he wrote his name on a wall, by proving his handwriting upon it, or must the wall be produced? The case of handwriting in the Bank books is precisely analogous, because for the sake of public convenience they cannot be removed.] The objection is, that you cannot ask the question whether it was the handwriting of the party, for the purpose of establishing the collateral fact. With relation to parish registers,—suppose it were sought to prove a collateral fact, as that a certain party was in that parish

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church on a certain day; that could not be done by proving his handwriting in the parish books; because it would be to prove a collateral fact, which might be established by independent evidence. It is submitted that if a document is required for a collateral purpose, the original document ought to be in Court, in order that the jury may, for the purpose of ascertaining its genuineness, have the opportunity of comparing it with other documents which may be produced, or for the purpose of cross-examining the witness who comes forward to prove it. The rule on this subject is thus laid down by *Powis, C. J.*, in *Rex v. Smith (a)*: "Where things are evidence of themselves, as corporation books, we make no rule to produce them, but only that a party may have copies, which copies are evidence; but this examination (before a Justice of the peace) is not evidence of itself, without proving the hand of the party; and so it is of warrants and affidavits; and, therefore, a copy of them is no evidence, and we must have the original, for nothing else concludes the party."

Thirdly, the learned Judge ought not to have received evidence of the conversation between Taylor and the plaintiff, behind the back of the defendant, after the stock had been transferred, and the transaction was at an end. That was a mere statement made by an agent, after his power to bind his principal was determined, and therefore could not affect the latter. [Lord Abinger, C. B.—Was it not part of the *res gestæ*?] It occurred after the transaction was at an end, and therefore was not admissible. It is immaterial whether it was on the same day or six months afterwards, provided the transaction was completed.—Fourthly, the four letters from the defendant to Taylor, containing the accounts between them, were improperly rejected. They were material evidence in the cause, as shewing the origin of the debt

(a) 1 Str. 126.

due from Taylor to the defendant, and therefore were admissible in evidence. The question was not, whether in the opinion of the learned Judge the fact to be established by them had been proved already, for the jury might not consider the proof already given as sufficient. The Judge cannot take into consideration the effect or the weight of the evidence, but merely its admissibility: *Crease v. Barrett* (a).—Fifthly, the plaintiff not having any stock of his own at the time of the sale, the contract was altogether void, by the provisions of the statute 7 Geo. 2, c. 8, s. 8, by which it is enacted, that “all contracts and agreements whatsoever, for the buying, selling, assigning, or transferring of any stock, or of any part, share, or interest therein, whereof the party contracting or agreeing, &c., to sell, assign, or transfer the same, shall not at the time of the making such contract or agreement be actually possessed or entitled unto in his own right, or in his own name, or in the name of a trustee or trustees to his use, shall be null and void to all intents and purposes whatsoever.” This action is in form an action of indebitatus assumpsit for stock sold by the plaintiff, but such an action is not maintainable, the contract for the sale of it being void: if there be any remedy at all, the plaintiff ought to have proceeded on the special contract, and have alleged as the consideration that he had procured a third party to transfer the stock. Lastly, the allegation in the declaration, of the acceptance of this stock, was disproved by the evidence, for the stock was standing in the name of Ward, and must be considered as transferred by him, and not by the plaintiff.

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Lord ABINGER, C. B.—I am of opinion that there is no sufficient ground to accede to any part of the motion in this case.

(a) 1 C., M. & R. 919.

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The first objection turns upon an alleged improper direction by the learned Judge, upon the question whether the credit was given to Taylor or to the defendant by the plaintiff. Now that question, undoubtedly, is one of a very important character, as it involves the practice of the Stock Exchange generally. I have no doubt myself, from the long experience I have had in matters of this description, that there is an understanding between the parties on the Stock Exchange, that *inter se* they hold the broker liable. I do not say that understanding would not have a very great influence on the question in individual cases; but it is admitted in this case that there was evidence which shewed that it was doubtful whether the party meant to hold the broker only responsible, or to have also the security of the principal. I do not apprehend the rules of the Stock Exchange would make any difference as to the right of a party who sells stock, to choose to what person credit shall be given if he thinks proper, and the evidence shews that it was the case sometimes to look to the principal. That, then, brings it to a question in this particular case,—whether or not the plaintiff meant to take the credit of Taylor only, and give up that of the defendant, or whether he insisted on the credit of the defendant? Now that was a question for the jury. I think there was evidence to go to them upon that question, and the learned Judge seems to me to have left it very fairly to them, and in words quite sufficient for the jury to understand that the question was, whether or not the plaintiff had sold the stock on the credit of Taylor only, and had given up his claim on M'Callan. If he chose to take Taylor and give up M'Callan, undoubtedly he must abide by the consequences. The whole question upon this part of the case is, whether he did so or not, and there was at least evidence to raise a question of doubt, which the jury alone could determine, and that question was left by the learned Judge correctly. I think, therefore, we cannot disturb the verdict upon that ground.

The next objection is, that the evidence of the defendant's handwriting, in the books of the Bank of England, was not admissible. Now it has been established by a series of decisions, the first of them I think by Lord *Mansfield* (a), that the books of the Bank of England being of great concernment to the whole of the national creditors, the removal of them would be so inconvenient, that copies of them might be received in evidence. It was founded upon the principle, that the public inconvenience, from the removal of documents of that sort, would justify the introduction of secondary evidence. That principle has been adopted in a variety of cases, and has never been questioned since. I know there have been attempts to apply it in cases where it was not applicable: the first was the case of *Rex v. Lord George Gordon* (b), where copies of the journals of the House of Commons were offered to be given in evidence, and supported on the ground of the above decision by Lord *Mansfield* as to the books of the Bank of England; but they were rejected by him on the trial, on the ground that no such inconvenience would attend the removal of the journals of the House of Commons, as any wishing to remove them could get the sanction of the Speaker to do so. Another attempt was made to give copies of the journals in evidence, on the trial of Lord Melville on his impeachment (c). There the case of *Lord George Gordon* was cited, and the ruling was said to have been in favour of receiving the secondary evidence; but Lord *Erskine*, who presided in the House of Lords, referred to that case, and shewed that the decision had

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(a) See Dougl. 593, n.; *Marsh v. Collnett*, 2 Esp. 665; *Lynch v. Clarke*, 3 Salk. 154; *Mann v. Carey*, Id. 155.

(b) Dougl. 590. There the copies of the journals are stated to have been received and read as evidence without objection; and

see the note at p. 593. See also 21 St. Tr. 543.

(c) See 29 St. Tr. 685. It would appear from that report, that the objection of the Lord Chancellor was not to the reception of *examined copies*, but of the *printed journals*.

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been to the contrary; and the evidence was rejected, on the ground that there was no such inconvenience attending the removal of the journals as of the books of the Bank. The next case that arose was with respect to the books of the Customs and Excise (a). It was formerly the practice to produce them, but after some consideration it was thought that the public inconvenience was so great, that it has become every day's practice, in this and the other Courts, to allow copies of those books to be received in evidence. That goes upon the general principle of not removing books of general concernment. Then does not that principle apply in all such cases? The public inconvenience in this case is as great as in the case of any other books. I think a case has been aptly put by my Brother *Alderson*, that if a writing were on a wall, might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing the wall in Court? Suppose a man, instead of printing a libel in the usual way, were to write it on the dead walls of the metropolis, is it to be said that he cannot be punished, because you cannot produce the wall in Court? May you not, in such a case, prove his handwriting? Nor is this case altogether imaginary—I would mention a case which occurred very early in my professional life, where a man was convicted of writing a libel on the wall of the Liverpool gaol. In that case the handwriting of the party was proved, and he was convicted. Formerly the actual production of an answer in Chancery was required, but the Lord Chancellor's officers had been in the habit of carrying out these documents without the consent of the Lord Chancellor, and as that was found to be inconvenient, they were forbidden to do it, and the consequence is, that an office copy is now given in evidence, in cases where the original would be evidence. I also remember a case where two persons were convicted in

(a) See *Rex v. King*, 2 T. R. 234; *Fuller v. Fetch*, Carth. 346.

Ireland of a misdemeanor against the revenue laws, and who could only be identified by proving the entries they had made in the Custom-house books, which were not removable upon the general principle of inconvenience to the public; and some one was called, not to prove that he saw them there, but to prove their handwriting; a bill of exceptions was tendered upon that very point, and the House of Lords determined that it was admissible evidence. That is exactly this case, except that it is stronger. Therefore I think it was competent evidence, for the purpose of proving the identity of the party who accepted this stock, to shew that an entry in the books of the Bank of England was the handwriting of that party. The principle of law is, that where you cannot get the best possible evidence, you must take the next best; and where the law has laid down that you cannot remove the document in which the writing is made, you are to be entitled to the next best evidence of it, by proving whose writing it was. I therefore think there is no ground for the rule upon this point.

The third point is, as to the admission of the evidence of what occurred between Taylor and the plaintiff, immediately after the transaction. As a general principle it is undoubtedly true, that conversations with an agent after the transaction are not evidence against his principal; but the question is, whether this be not a part of the *res gestæ*? It is part of the evidence to shew that the plaintiff did not trust Taylor, and I do not know how it could have been shewn otherwise. It is before the transaction is concluded, that is, before payment is made; and I think it is receivable: it is not a conversation between an agent and principal after the transaction is concluded, but a conversation at the time he is dealing with him, and a part of the *res gestæ*.

Then, the fourth objection is, that letters were rejected which, it is said, tended to shew more satisfactorily the debt which the defendant claimed to be due from

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Taylor. If the question was, whether Taylor owed M'Callan a sum of money, these accounts would not prove it. How could accounts between Taylor and the defendant tend to establish the existence of a debt, in an action between the defendant and a third party? I think they certainly were not evidence at all. The letters directing the money to be invested were evidence, because they were directions given to the agent; they were evidence of the fact; but it is quite new to me for a party to say, I will establish a debt due to myself, by letters of my agent, who is not a party in the cause. I think, therefore, these letters were properly rejected.

The next point is, that the stock was not the stock of the plaintiff, but was Ward's stock; and it is said that the plaintiff could not enforce his contract for the sale of this stock, because he had none at the time of the contract. That general proposition certainly is not true; how many merchants are there who make contracts to sell things which they are not in possession of? Can it be doubted, that a man who has made a contract to sell that which he is not then possessed of, if he obtain means to perform that contract, and to deliver the thing sold, by his own hands or by the agency of another, is entitled to recover the price of it? But it is said, that by reason of the prohibition in the act of Parliament, he could not sell this stock. Now that act was made for the purpose of preventing what is declared to be an illegal trafficking in the funds, by selling fictitious stock merely by way of differences; but it never was intended to affect bonâ fide sales of stock, or to say, if a man undertakes to sell stock to another, and transfers the actual stock, and delivers it to him, and he accepts the stock, that that is not a lawful transaction. That is not a case within the statute at all. True, the plaintiff had not the stock at the time it was purchased, but he had it before it was invested in the name of the defendant; and whether he transferred it to the defendant himself, or procured another person to transfer it for him, makes no difference.

In point of fact, he procured stock; and through his instrumentality, the defendant became possessed of the stock; and therefore, whether he had it transferred into his own name first, and then re-transferred it, makes no difference. I therefore think there is nothing in that objection.

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The next is, that the issue, that the defendant accepted the stock from the plaintiff, was not proved. Now let us see what that issue is. The declaration states, that the defendant was indebted to the plaintiff in the sum of £5000 for certain stock then sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted. The meaning of that is, that it was sold and delivered to the defendant, and that he took to it; that he took the stock as his own, not that he accepted it from the plaintiff. Then the defendant, by his plea, endeavours to introduce that which is not part of the averment in the declaration. He says, I did not accept from the plaintiff, meaning to say he accepted from Ward; but that is no part of the issue in the sense in which it has been contended for; the words "from the plaintiff" there are immaterial—the question is, whether he did not accept the stock, and he did. But I cannot agree altogether that he did not accept it from the plaintiff, supposing that was material to the issue. The plaintiff is the person who causes Ward to transfer, and Ward having transferred, the defendant accepted this stock—that is, the stock which the plaintiff had undertaken to transfer to him; and thus he does accept it from the plaintiff. It appears to me, therefore, that there is no ground for a rule in this case on any of the points which have been suggested.

ALDERSON, B.—I am of the same opinion. It appears to me that the question was properly left to the jury, it being in substance whether the plaintiff trusted Taylor, or trusted M'Callan, the principal. There was abundant evidence from which the jury might reasonably infer that he trusted

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Judge and the Court are perfectly satisfied with that as a
conclusion of fact. It was the proper point to be left
to the jury, and it seems to me that it was the only ver-
dict which could reasonably, under the circumstances, be
found.

The second question is, whether or not the acceptance of the stock was proved, by the evidence which was offered of the handwriting of the defendant in the Bank books. Now it appears that the documents produced shew a transfer and acceptance in point of form, but these being only copies, they do not shew that the stock was transferred to and accepted *by the defendant*, unless some act of his, done at the time when he is at the Bank, in the Bank books, be also shewn. The Bank books are not capable of being produced without so much public inconvenience, that the Courts have directed them to remain in the Bank, and copies of them to be received in evidence for the purpose for which the books are receivable. Then, if they are not removable on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. Inscriptions upon tombstones or on a wall are proved every day in this way for that reason. The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule. Then how is it shewn that that of which a copy has been produced, has been executed by the defendant? That is proved by the person who saw Mr. Ward and him going towards the Stock Exchange; by the clerk at the Bank, who saw Mr. Taylor in an unknown person's presence at the time of the transfer and the acceptance of the stock, and by his pointing out to a third person the acceptance of the stock, which person knows that it is in the handwriting of the defendant. Putting all these things together, can any one doubt that this is reasonable evi-

dence from which the jury might conclude who were the two persons who were seen engaged in the transfer and acceptance in the Bank books?—one of whom is proved to have been Taylor by the evidence of the Bank clerk, and one is proved to have been M'Callan by the testimony of the person who proves that the acceptance is in his handwriting. It appears to me that from that evidence, the only reasonable conclusion to be drawn, is that which the jury have drawn. The distinction in these cases is between the admission of evidence and the weight of evidence; I quite agree that if the document is not produced, less weight ought to be given to it; but that is a question for the jury. The only question for the Court is, is it admissible as evidence of identity? I have no doubt that it is.

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Then, with respect to the admission of what occurred subsequently to the transfer, the question is, was that part of the transaction, and what was the conversation itself? It appears to me to be part of the transaction; but, independently of that, the conversation itself, though, being in words, it may be called an admission, is in truth an act, demonstrated by the words used. It is a demand of the cheque of the principal, by which the one party claimed payment, and which had been stopped by the other. Suppose it had been in writing,—such a demand afterwards of the principal's cheque would have been a fact which would have had a tendency to convince the jury that the principal was trusted, and not the person from whom the cheque was demanded; for if, at the time of the transaction, the plaintiff had demanded the cheque of Mr. Taylor, that would have been strong evidence to shew that Taylor was trusted; if, on the other hand, the cheque of the principal was demanded from Taylor, that would be very strong evidence to shew it was the principal who was trusted, and not the broker. Then this in truth is not an admission in words by the agent of a debt from the principal, but it is an act done by or through the agent, which is competent to be

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given in evidence independently of its being a part of the original transaction. Therefore I think that was properly admitted.

With respect to the letters, I entirely concur in the view my Lord has taken of them ; but, independently of that, supposing the letters to have been receivable, and supposing them to have been rejected by the learned Judge, I apprehend we ought not, on this account, to grant a new trial, the object, and the sole object, of these letters being, if they were admissible, to prove a fact admitted in the course of the cause. In the case of *Edwards v. Evans* (a), this point arose. That was an action for bribery, and the question was, whether or not certain conversations had taken place between the party accused and the party who was supposed to have bribed him—a gentleman of the name of Kinnaird. The plaintiff called a witness who proved the conversation with Kinnaird, and then called another witness to prove the same conversation. Then a very nice question arose, whether that witness was incapacitated from being examined on the ground of his having an interest in the transaction. The learned Judge, Mr. Justice *Lawrence*, who tried the cause, was of opinion that he ought to be rejected on the ground of interest, and the question was raised before the Court whether the Judge had been right in so ruling, and all the Court concurred that it was a very considerable question for the consideration of the Court, and upon that ground a rule ought to be granted ; but inasmuch as it appeared from the Judge's report that the question at the trial did not turn on the words used in the conversation, which alone the witness was called to prove, that conversation having been proved by another person, and the whole defence turning, not on the denial of the words, but upon the question whether those words were spoken seriously or were used merely in jest, the Court, upon the ground that the examination of

(a) 3 East, 451.

the second witness could not have at all tended to alter the verdict as found, inasmuch as it was conceded that what that witness was to have proved had been proved before, refused the rule for a new trial, though they were of opinion that the witness had been improperly rejected, or at least that the question as to his improper rejection was a question well deserving the consideration of the Court. Lord *Ellenborough* there says: "Here the issue, which went to the jury, was quite collateral and immaterial to what the witness was called to prove. For the evidence of Mr. Kinnaird, which Bradley was called to corroborate, was admitted to be true, and the defence made was quite collateral to it, upon which the verdict was given." Sir *W. Follett* has stated that we cannot tell what operates on the minds of the jury—so it might have been said in *Edwards v. Evans*, "the jury have not told us whether they did not disbelieve Kinnaird, or whether they might not have believed him in case he had been confirmed by Bradley:" but as the whole defence was collateral to that, it was presumed that the jury, as men of understanding, did not disbelieve the witness who was called, as the fact he deposed to was not disputed at the time. Now these letters were tendered in evidence to shew the existence of a debt between M'Callan and Taylor; and when Mr. *Cresswell* comes to reply, he admits that to be the fact; and that being a fact admitted, and that fact being the only object for which the letters were tendered, it would be a new thing to grant a new trial upon the ground that letters were rejected, which only had a tendency to prove a fact which, being before admitted, was not left to the jury at all. I entirely concur in all the doctrine laid down in *Crease v. Barrett*. This is a case excepted out of the principle of *Crease v. Barrett*, exactly in the same way that *Edwards v. Evans* was conceded, in the judgment in *Crease v. Barrett*, to be law, and was quoted for that purpose. Therefore, upon that ground I think there is no ground for a new trial.

With respect to the point as to the form of the plead-

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ings, it appears to me, that, after the decision of this Court in *Hibblewhite v. M'Morine* (a), in which the doctrine of Lord Tenterden, in *Bryan v. Lewis* (b)—that a party could not maintain an action for the price of goods which he had not in his possession at the time of the contract—was held not to be maintainable in point of law, inasmuch as it would put an end to half the commercial contracts in London;—the circumstance of the plaintiff not having stock at the time of the contract is immaterial, if he had stock to deliver at the time the transfer was to be made. Here he had stock at the time the transfer was to be made, for he procured Mr. Ward to transfer the actual quantity of stock, and the defendant accepted it; and it is immaterial to him whether he received the actual quantity of stock from the plaintiff or from Mr. Ward, provided he received under the contract with the plaintiff that which he received from Mr. Ward. I think the case is not within the act of the 7 Geo. 2: that act was intended to prevent gambling transactions where the stock is not delivered in any part of the transaction, and where all that is sought to be recovered is a compensation for a fictitious sale, which was a mere imagination between the parties,—in truth, nothing more or less than a gambling transaction, and a bet between them as to the price of stock. That was the kind of dealing intended to be prohibited; but here the stock is actually delivered, the defendant has received it, and I think he may therefore well have an action brought against him, in which the declaration states it as a contract for stock sold and delivered.

Then comes the last question—is there any proof that it was accepted by him? I quite agree with what my Lord has stated, that it is not necessary for the purpose of this declaration, or to support the plaintiff's claim, that there should have been an acceptance proved in the very terms in which it is put by the defendant; but if it were, I think

(a) 5 M. & W. 462.

(b) Ry. & M. 386.

it has been proved. In truth, the stock has been accepted under the contract; for it has been transferred to the defendant, and has been accepted by him; although transferred by Ward, it has been accepted by the defendant under his original contract with the plaintiff. Upon these grounds, I am of opinion that there should be no new trial.

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GURNEY, B., concurred.

Rule refused.

YATES and Another v. THE DUBLIN STEAM PACKET
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THIS was an action against the defendants, as the owners of a steam packet called the *Duchess of Kent*, for running down a vessel called the *Byron*, whereby certain goods of the plaintiffs, then on board the latter vessel, were lost. Plea, not guilty. The cause was tried before *Gurney, B.*, at the London Sittings after Michaelmas Term, when a verdict was found for the defendants. Another action against the same defendants, by the owners of the *Byron*, for the loss of her by the same injury, was entered in the cause list for trial; but, on the verdict being returned for the defendants in this action, the record in the other was withdrawn.

In an action by the owners of goods which were on board a vessel, and were lost by a collision with the defendants' vessel, the jury having found a verdict for the defendants, the plaintiff in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record. The Court refused, on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was

Sir *F. Pollock*, for the plaintiffs, now moved for a rule to shew cause why the judgment and execution in this action should not be stayed until after the trial of the other action. The application was made on an affidavit stating that a witness, who was absent at the trial of this cause, having been detained at sea by contrary winds,

stated on affidavit that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other: the Judge being satisfied with the verdict.

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would be able to give material evidence in favour of the plaintiffs' case, on the trial of the second cause, at the next sittings. He referred to a case of *Cobbold v. Grinnell* (a), in which the Court of King's Bench, under similar circumstances, granted a stay of proceedings until after the trial of a second action arising out of the same injury; and urged that such an arrangement would best effectuate the real justice of the case. [*Alderson*, B.—It is the plaintiffs' own fault if they went to trial on insufficient evidence. If this affidavit had been produced at the trial, the learned Judge would probably have postponed it.—*Gurney*, B., expressed his opinion that, upon the balance of the evidence, the verdict for the defendants was right.]

ALDERSON, B.—I think we ought not to accede to this application. I fear that if the Court were to grant this rule, it might be drawn into a dangerous precedent. This is a case in which the verdict is satisfactory to the learned Judge who tried the cause, and it is not suggested that there has been any misdirection: but it is said that there is another case involving precisely the same question, which stood next after this for trial, and was withdrawn in consequence of the verdict in this action, and it is suggested that the parties will be enabled to try the second cause with additional testimony, and so make that more clear in favour of the plaintiffs, which before was in doubt in the opinion of the jury. The only authority which has been referred to is the precedent made by the Court of King's Bench in the case of *Cobbold v. Grinnell*. But in that case the Court intimated some dissatisfaction with the verdict—at least they thought there was good ground for further inquiry to be made with respect to it. They did not, however, grant a new trial, where there was another cause depend-

(a) E. T. 1832; not reported.

ing which would decide the same point, and which might be decided so satisfactorily as to render it unnecessary to grant a new trial; but thinking the matter somewhat doubtful, the Court granted the rule to which Sir *F. Pollock* has referred. I am not prepared to dissent from the principle of that decision; and if it appeared that there had been any injustice done to the plaintiffs in the present case, we should be disposed to grant them the indulgence which is asked. But it is to be observed that the case of *Cobbold v. Grinnell* was very different from the present, as to the party applying for redress; there the application was made by the defendant, here it is by the plaintiffs. The defendant has no command over the record, and can only ask to postpone the trial on affidavits, on the ground of the absence of a material witness whom he has subpoenaed; and if there have been any neglect on his part, the Court will not assist him, and the plaintiff recovers against him. The plaintiff, on the other hand, may, at the beginning, and even at the end of his case, stop the trial, at the expense of paying the costs of the day, and so prevent a decision from passing finally against him. He may withdraw the record in the first instance, if he has not sufficient evidence; and even after he has fully heard the defendant's case, and the summing up of the Judge, he has to the last moment allowed him, if he choose, to be nonsuited, and withdraw from proceeding further. The plaintiffs in this case chose not to do that, but took their chance of obtaining a verdict, and that when they knew all the facts, and the opinion of the Judge, and the manner in which he was submitting the case to the jury. Under these circumstances, it appears to me that the authority of *Cobbold v. Grinnell*, which was decided on the particular circumstances of that case, does not apply to the present, where the plaintiffs, having all these advantages, were content to stand upon the evidence; and that we should

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be establishing a very dangerous precedent if we were to accede to this motion. The rule must therefore be refused.

GURNEY, B.—I think, upon the evidence, the verdict was right; but if it had been the other way, I should not have thought it a case in which to grant a new trial.

ROLFE, B., concurred.

Rule refused.

PRINGLE v. MOLLETT.

The charterer of a ship for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost, after the completion of the loading.

THIS was an action of assumpsit on a memorandum of charter-party, brought to recover £60 for demurrage for ten days, at the stipulated rate of £6 per day, and damages for the detention of the plaintiff's ship *Diadem* by the defendant for thirty-three days. The defendant pleaded, by his first plea, as to so much of the causes of action in the declaration (consisting of one count) as relates to the keeping and detaining the said ship over and above the fifty days and ten days on demurrage in the memorandum of charter-party mentioned, except as to fourteen days, that he did not keep or detain the said ship; and in his second plea, as to the residue of the causes of action, the defendant pleaded a payment of £144 into Court, with an averment of no further damage in respect thereof. The plaintiff, in his replication, joined issue on the first plea, and took the money out of Court on the second.

The parties agreed to take the opinion of the Court on the following case.

The material part of the memorandum of charter-party is as follows:—"Memorandum of charter-party, London, 19th Jan., 1837. It is this day mutually agreed between

Harrop Pringle, Esq., owner of the good ship or vessel called the *Diadem*, L. Leslie, master, of the measurement of 376 tons or thereabouts, now lying at Shields, and John Mollett, Esq., of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Odessa, (then follow stipulations as to the cargo and rates of freight): it is further agreed, that on the ship's arrival at Odessa, the freighter's agents shall have the option of employing her for one intermediate voyage to a safe port in the Mediterranean, on paying three-fifths of the above freight: fifty running days are to be allowed to the said merchant (if the ship is not sooner despatched) for loading and unloading upon each voyage, (if two), and ten days on demurrage over and above the said laying days, at £6 per day." After arriving at Odessa, the vessel proceeded, according to the terms of the memorandum of charter-party, on an intermediate voyage to the Mediterranean, upon which no question has arisen. On the 28th of November, 1837, the *Diadem* again arrived in the mole at Odessa, and was ready to be loaded on the 9th of December following, on which day her loading was commenced, with a general cargo, consisting of timber, pearl ashes, wool, tallow, seed, and grain; and on the 9th of February following the said loading was completed. On the 29th of December, 1837, and during the progress of the said loading, the mole was frozen in, and in consequence thereof the *Diadem* was fixed in the ice, and totally unable to sail homeward until the 28th of February, 1838, when the captain and crew were enabled, and not before that time, to cut through the ice, and to get the *Diadem* into clear water. The ship afterwards arrived in London, and employed eleven days there in unloading. The whole period at Odessa, between the 9th of December, 1837, and the 28th of February, 1838, was 82 days, which, with the

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time of detention at London, amounted to 93 days, which, after deducting therefrom the 50 running days allowed by the memorandum of charter-party for loading and unloading, are reduced to 43 days, in respect of which the action is brought.

The payment of £144 into Court is computed by the defendant, and paid by him, in respect of 24 days, namely, the ten days on demurrage, three days of detention at Odessa, (the 7th, 8th, and 9th of February), and eleven days at London.

If the Court shall be of opinion that the defendant is liable for the detention of the vessel from the 9th of February until the 28th of February, or any part thereof, that is to say, from the time that the loading was completed until the vessel was free from ice, then a judgment shall be entered for the plaintiff for the sum of 120*l.*, or such sum as the Court shall be of opinion the defendant is liable for, by confession: and if the Court shall be of opinion that the defendant is not so liable, then a judgment of *nolle prosequi* shall be entered for the defendant. Either party to be at liberty to refer to the pleadings, or memorandum of charter-party, as part of the case.

The points marked for argument were as follows:—For the plaintiff—that the owner is entitled to recover for those days mentioned in the case. For the defendant—that he is not liable to pay for the detention of the vessel by the frost, from the time that the loading was complete until the vessel was freed from the ice.

Alexander, for the plaintiff.—The payment into Court covers the space of 24 days, of which three were days of detention at Odessa; but the plaintiff claims to recover in respect of 19 additional days, during which the vessel was frozen in; and the question is, whether the owner of

the ship, or the charterer, is to bear the loss arising from that unavoidable detention. The general rule of law is, that detention is to be paid for by the charterer, and not by the owner: *Abbott on Shipping*, 269 (6th edition). *Barker v. Hodgson* (a), and *Barrett v. Dutton* (b), are authorities to shew that the freighter of a vessel is not excused from the performance of his covenant by an unavoidable detention. [Parke, B.—This is a very different case: in those cases the loading of the vessel was impeded; here the detention was not during the loading, but after it was completed the ice prevented her sailing. The defendant has paid for all demurrage during the time of loading. Lord Abinger, C.B.—The meaning of “running days” is, that the freighter shall not waste time in loading and unloading.]

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PER CURIAM.—This is a clear case, and the judgment must be for the defendant. The detention by the ice was not occasioned by any fault of the defendant. In order to render him liable, the detention must have been for the purpose of loading. Here the ship was detained only three days for that purpose, and those have been paid for.

Judgment for the defendant.

W. H. Watson was to have argued for the defendant.

(a) 3 M. & Sel. 267.

(b) 4 Campb. 333.

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JONES and Another v. JONES and Another.

Plea, to an action of debt by the payee against the maker of a promissory note payable on demand, that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorized by him; and that there was not any consideration or value for the making or payment of the note, except as aforesaid:—*Held* bad on general demurrer.

The plaintiff replied, that after the making of the contract, the defendant paid part of the purchase-money, and was let into possession, and that the plaintiff had always been ready and willing to execute a conveyance:—*Quæritur*, whether this replication was bad for multifariousness.

DEBT by the payees against the makers of a promissory note for £35, dated 6th June, 1838, payable on demand: with a count on an account stated.—Plea, as to the first count, that the promissory note in that count mentioned was made and given by the defendants to the plaintiffs for the payment of a certain sum, to wit, the said sum of £35 in the said note mentioned, as and for the purchase-money to be paid to the plaintiffs for the sale to the defendant Owen Jones of a certain cottage and land, by virtue of an agreement then, to wit, on the 6th June, 1838, made between the defendant Owen Jones and the plaintiffs for the sale of the said cottage and land; and that the said contract for the sale of the said tenement was not, nor was any memorandum or note thereof in writing signed by the said Owen Jones, being the party to be charged therewith, or any person or persons thereunto lawfully authorized by him: and the defendants further say, that there was not at any time any consideration or value for the defendants' making the said promissory note, or payment of the amount thereof, except as aforesaid; and the plaintiffs have held, and now hold, the same without value or consideration.—*Verification*.

Replication, that at the time of the making of the said contract in the said first plea mentioned, the defendant Owen Jones paid to the plaintiffs a certain sum, to wit, the sum of 4*l.* 10*s.*, in part satisfaction and discharge of the purchase-money for the said cottage and land in the said first plea mentioned, and was then, to wit, on the said 6th day of June, 1838, put into the possession of the said cottage and land, and from thence hitherto hath been and still is in the possession and enjoyment thereof, under and in pursuance of the said contract; and the plaintiffs in fact further say, that from the time of the making of the

said contract, they, the plaintiffs, have always been and still are ready and willing to execute a conveyance of the said cottage and land to the defendant Owen Jones, according to the said contract.—Verification.

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Special demurrer, on the grounds that the replication neither traversed nor confessed and avoided the plea; that it offers immaterial issues, and that it is multifarious.—Joinder in demurrer.

Hayes, in support of the demurrer.—The plaintiffs cannot recover under the circumstances disclosed on this record. First, the replication is multifarious: it alleges, by way of answer to the plea, first, the part-payment of the purchase-money; secondly, the letting of the defendant into possession; and, thirdly, the willingness of the plaintiffs to execute a conveyance. The letting into possession is a fact altogether beside the part-payment of the purchase-money; each may have an effect in equity, but they are distinct grounds of answer, and the defendants cannot take issue on both. If either be material, one is as much so as the other, and the defendants cannot tell which is relied on. [*Parke*, B.—Is the plea good? The defendant chooses to give the note on being let into possession; then surely he must pay it: he has got all he bargained for.] Nothing appears upon the plea but that the note was given on a verbal contract for the sale of land, and that there was no other consideration for it. [Lord *Abinger*, C. B.—The defendants say the contract was not in writing; does it therefore follow that the plaintiff will not execute it? The plea should have alleged that the plaintiffs had refused to transfer the estate to the defendant. *Parke*, B.—The defendants are bound to pay the note, unless they shew that there was no consideration whatever for it. How do we know, from the plea, that the defendant has not had possession?] The plea is to be looked at as upon a general demurrer; and the allegation, that there was no other consi-

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deration for the note except the parol agreement, excludes the notion that anything has passed besides the mere executory contract. Then there is no valid agreement to satisfy the Statute of Frauds. The action in effect is to enforce an agreement in breach of the statute. An agreement within the statute must, in order to give a cause of action, contain in the writing the consideration for the promise, as well as the promise itself: *Wain v. Warlters* (a), confirmed by *Saunders v. Wakefield* (b). This is a contract altogether executory. Can it be said the agreement is not binding when it stands merely as a contract, but becomes binding by the giving of a promissory note? There is no distinction between that and any other promise to pay in futuro, except its negotiability, and that it *primâ facie* imports consideration. [*W. H. Watson*, for the plaintiffs, referred to *Sowerby v. Butcher* (c)]. That case did not arise on the Statute of Frauds. There, also, there clearly was a consideration, in the contract implied by the bill of exchange to give time to the third party. This is in truth an action to recover the purchase-money of an estate, and what the estate was is to be proved by parol. [*Parke*, B.—We must assume, on these pleadings, that the note was given for the purchase-money, and that the plaintiffs are perfectly ready to execute a conveyance. The plea does not aver that they are not ready and willing to convey. Although, therefore, they may not be bound to perform the agreement, yet, if they are ready to do so, what right have the defendants to refuse to pay their note? They have all they bargained for. But further, is it not necessary in equity that there should be both part payment and a letting into possession, to give validity to the contract? If so, the replication is not double.] Part payment alone is sufficient under certain circumstances (d). Then, on the face of the

(a) 5 East, 10.

(b) 4 B. & Ald. 595.

(d) See Sugd. Vend. and P.,

3rd. edit., vol. 1 p. 202.

(c) 2 C. & M. 372.

plea, it is a mere executory contract for the sale of land, and the note is no more than a written agreement to pay in futuro the purchase-money of an estate, which by the contract is left wholly uncertain, and cannot be supplied by parol.

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Watson, contra.—The plea is bad. The promissory note on the face of it imports consideration, and the plea must shew an absolute and total failure of consideration, in order to defeat the plaintiffs' right of action: it must disclose circumstances such as that, if money had been paid instead of a note being given the defendant would have been entitled to receive it back: *Stephens v. Wilkinson* (a). Could the defendants have done so, before the plaintiffs had refused to convey? Certainly not, because till then there would be no failure of consideration. The plea does not shew that the plaintiffs have refused or are unable to convey; nay, it is consistent with it that the land has in fact been conveyed since the note became due: the only allegation is, that there was no other consideration "for the making or payment of the note" but the parol contract. The total failure of consideration consists in the parol agreement, *and* the refusal to convey in pursuance of it. The Statute of Frauds has no application. It has been repeatedly decided, that a bill given for the debt of a third party is good, without any new consideration: *Popplewell v. Wilson* (b), *Sowerby v. Butcher*. [*Parke, B.*, referred to *Nelson v. Serle* (c).]

Secondly, the replication is not double. The whole taken together shews that it is a binding contract in equity. A Court of equity looks at all the circumstances. But it is also good as matter of law; it shews several things done under the contract, which binds the de-

(a) 2 B & Adol. 320.

(b) 1 Stra. 264.

(c) 4 M. & W. 795.

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defendants.—He referred to Poph. 186, *Gascoyne v. Smith* (a), *Stevenson v. Underwood* (b). [Parke, B.—The objection is, that you insist on several different matters, each of which is put forward as an answer to the plea. The putting the defendants in possession would itself be an answer; they say therefore that the replication is multifarious.]

Hayes, in reply.—The consideration *has* totally failed here: the defendants bargained for the title to the estate, not for the mere possession, which they may be turned out from by the plaintiffs at any time: the plea sufficiently negatives, at least on general demurrer, all other value or consideration except the mere executory contract. *Jackson v. Warren* (c) is an authority for the defendants. But even if possession had been given, the objection still applies, that this is an action brought on a contract in violation of the Statute of Frauds. There are many cases in which a contract cannot be enforced, where the money paid under it could not be recovered back. The statute cannot be avoided merely by giving a note for the purchase-money of the land. Where a note is given which is payable after a certain date, it implies a forbearance for that time, which may be a sufficient consideration, whereas this is payable on demand. With respect to the replication, if it discloses several defences at law, it is multifarious; nor does it satisfy equity, for it does not state that the plaintiffs are able to convey.

Lord ABINGER, C. B.—It is clear that this is a case where the parties have paid their money down,—or, what is equivalent, given a promissory note payable on demand,—for a future conveyance. Can anybody say they are not bound to pay it, unless they shew that the plaintiffs have

(a) M'Clell. & Y. 338.

(b) 6 Dowl. P. C. 737.

(c) 7 T. R. 121.

refused to execute that conveyance? I think the plea is *Exch. of Pleas,*
clearly insufficient. 1840.

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JONES.

The rest of the Court concurred.

Leave to amend on payment of costs ; otherwise,

Judgment for the plaintiffs.

HUMPHREYS v. GRIFFITHS.

WELSBY applied for leave to enter an appearance for the defendant pursuant to the statute. It appeared from the affidavits, that the defendant was confined in a lunatic asylum at Shrewsbury ; that the party employed to serve the *distringas* went to the asylum on three several occasions, and saw the keeper, who refused to let him see the defendant for the purpose of serving him with a writ, and told him that such was the rule of the establishment, and that if he called twenty times he would not be permitted to see the defendant. On the last occasion the deponent left a copy of the *distringas* with the keeper. [Lord Abinger, C.B.—Can you do this in the case of a lunatic? We cannot appoint a committee.] The plaintiff might have entered an appearance without leave of the Court, if the party had been personally served ; he only comes to the Court to shew that all due diligence has been used to serve him. [Parke, B.—A lunatic may appear by attorney: *Beverley's Case* (a).] *Service of distringas on lunatic.*

THE COURT directed that the appearance should be recorded, on production to the Master of an affidavit of notice to the keeper of the lunatic asylum of the plaintiff's

Exch. of Pleas, intention to enter an appearance for the defendant, and
1840. that he should proceed thereon to judgment and execution.

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Rule accordingly.

SCHERWINSKI v. PERONNET.

Where a defendant, on being held to bail under a Judge's order, deposits with the sheriff the amount indorsed on the writ, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2, and afterwards allows those sums, with an additional 10*l.*, to be paid into Court, the plaintiff is not entitled to have the two former sums paid out to him.

IN this case the defendant had been held to bail under an order of *Rolfe*, B., for 56*l.* 10*s.*, and discharged on depositing with the sheriff that sum, with £10 for costs, pursuant to the statute 43 Geo. 3, c. 46, s. 2. In lieu of perfecting special bail, he allowed the above sums, together with an additional £10, to be paid into Court. The plaintiff having obtained a rule to shew cause why he should not be at liberty to take out of Court the sum of 56*l.* 10*s.* and £10, on an affidavit stating that the defendant had not put in and perfected special bail—

Jervis shewed cause.—The plaintiff is not entitled, upon this affidavit, to take the money out of Court. The affidavit ought to have shewn, not only that the defendant had omitted to put in and perfect special bail, but also that he had omitted to do that which is equivalent to it, viz. to pay into Court an additional sum of £10, under the stat. 7 & 8 Geo. 4, c. 71, s. 2. The 4th section of the 1 & 2 Vict. c. 110 expressly directs, that all the subsequent proceedings, as to making deposit and payment of money into Court, shall be according to the previous practice.

Cowling, contra, contended, that the plaintiff was at liberty to proceed under the provisions of the 43 Geo. 3, c. 46, s. 2, and to have this money paid out to him. If the plaintiff paid in the additional £10 under the stat. 7 & 8 Geo. 4, c. 71, s. 2, he ought to have stated that by affidavit. But,

PER CURIAM.—The rule must be discharged: the plaintiff has obtained all the security he is entitled to.

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1840.

SCHERWINSKI
v.
PERONNET.

Rule discharged.

TAYLOR and Another v. NICHOLLS.

SIR F. POLLOCK had obtained a rule to shew cause why the warrant of attorney given by the defendant in this cause, and the judgment and execution thereon, should not be set aside, with costs, on the ground that the warrant of attorney was not executed pursuant to the requisitions of the stat. 1 & 2 Vict. c. 110, s. 9. The following appeared, from the affidavits on both sides, to be the facts of the case.

A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose.

The plaintiffs, who were the trustees of the defendant's marriage settlement, had allowed him to take into his hands some of the trust funds, which they subsequently required him either to replace or to give security for. An interview in consequence took place between the defendants and Messrs. Alexander, of Halifax, the attorney of the trustees, and the defendant, on the following day, the 19th of October, 1839, called at their office, and agreed to execute a warrant of attorney to the plaintiffs for the sum of £1200. One of the Messrs. Alexander accordingly prepared the warrant and read it over to the defendant, and told him that it was necessary that some attorney should be present on his behalf, to attest the execution of it by him, and inquired whom he would wish to have for that purpose. The defendant replied that he had no wish to have any particular attorney, but that his only anxiety was, that the transaction might not become known. Mr. Alexander thereupon mentioned the name of a Mr. Crosseley, of Halifax. The defendant immediately assented, and went, accompanied by Messrs. Alexander's clerk, to

A defendant may apply to set aside a warrant of attorney and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110, s. 9, although he have become bankrupt since the execution of it.

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Mr. Crosseley's office. On their arrival there, the warrant of attorney was produced; Crosseley took it into his hands, and asked the defendant if he wished him to attest the execution of it on his behalf. The defendant replied that he did. Crosseley asked him if it had been read over to him, and if he understood it. The defendant replied that it had been read over to him by Mr. Alexander, and that he fully understood it. It was then executed by the defendant, and attested by Crosseley as his attorney, in the terms of the statute. Judgment was entered up on the warrant of attorney on the 21st of October, 1839, and execution sued out on the 22nd. The defendant in his affidavit stated, that when he executed the instrument he had no knowledge of Crosseley, and had never seen him before, and did not know whether in fact he was an attorney or not: and that he understood, at the time of signing the warrant of attorney, that it would not be enforced against him. On the 25th of October a fiat in bankruptcy issued against the defendant, founded on an act of bankruptcy committed on the 17th.

Cresswell shewed cause.—It may be doubtful whether the defendant, having become bankrupt, can now make this application: he can no longer be affected by the warrant of attorney. [*Parke, B.*—He has an interest to set aside the judgment, because he may be taken under it hereafter upon a ca. sa.]—The application is rested on two grounds: first, that Crosseley, as it is alleged, was not expressly named by the defendant to act as his attorney; secondly, that the warrant of attorney was not explained *by him* to the defendant. With regard to the latter point, the statute does not require in terms that the warrant of attorney should be read over, or explained to the defendant, by the party who attests it. As to the other point, the execution was sufficient to satisfy the statute. The mere circumstance of the attorney's name hav-

ing been suggested by the plaintiff's attorney cannot vitiate the transaction, if the party named be afterwards really and substantially adopted by the defendant as his attorney. *Bligh v. Brewer* (a), which was decided on the construction of the rule of H. T., 2 Will. 4, r. 72, (of which the statute is only an extension, applying its provisions to defendants not in custody), is an express authority to that effect. If it were otherwise, what must be done where the defendant knew no attorney whatever in the place to which he came for the purpose of executing the instrument? *Mason v. Kiddle* (b), which may be cited on the other side, only decided that the party attesting for the defendant must be an attorney other than the plaintiff's: and it appears from the recent decision in *Rising v. Dolphin* (c), that that case is not to be considered as inconsistent with *Bligh v. Brewer*. [Parke, B.—If the attorney's name must *originate* with the defendant, it would be equally fatal whether it were suggested by the plaintiff's attorney or by a third person. Alderson, B.—The word “expressly” is not to be construed as meaning “originally.”] *Bligh v. Brewer* went further than the present case, because there the defendant had an attorney whom he generally employed, only he was from home: here it does not appear that he had any. [Parke, B.—The only question appears to be, whether that case has been broken in upon by any more recent decision.]

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Sir F. Pollock and W. H. Watson, *contra*.—The object of the statute was, that at the execution of any cognovit, or warrant of attorney, there should be an attorney present on the part of the person signing it, really and *bonâ fide* employed by him, in whom he is to repose confidence, and who is to give him the assistance contemplated

(a) 1 C., M. & B. 651; 5 Tyr. 222; 3 Dowl. P. C. 266. (c) Bail Court, H. T. 1840; not yet reported.

(b) 5 M. & W. 573.

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by the act, viz. to explain to him the nature and legal consequences of the execution of the instrument, and to see that he is not signing a document he ought not to sign. The very intent of the act of Parliament was to guard against the mischief likely to arise from the interference of the plaintiff's attorney. He ought to decline to name any person, and to tell the defendant to consult some friend on the subject. [*Alderson, B.*—Does the phrase “expressly named,” mean anything more than it is not to be collected impliedly from the facts of the case, that he is the defendant's attorney, but that he must be actually named by him?] If the defendant consults a friend, and at his suggestion names an attorney, that is a naming by the defendant; but if there is no nomination but by the plaintiff's attorney, that will be substantially naming an attorney for the plaintiff instead of the defendant, and is the very mischief to be avoided. It is not so much a question whether the party is literally named by the defendant, as whether he is bonâ fide his attorney, to advise him fully as to the nature of the act he is doing. This was merely a cloke to give the transaction an apparent validity. But further, he is to be named “to inform the defendant of the nature and effect” of the instrument. Here it was explained to the defendant, not by Crosseley, who assumed to act as his attorney, but by the plaintiff's attorney only. He has received from Crosseley no explanation or advice whatever.—They cited *Hutson v. Hutson* (a), *Fisher v. Papanicholas* (b), *White v. Cannon* (c), and *Rice v. Linsted* (d).

PARKE, B.—I am of opinion that this rule ought to be discharged. The question turns entirely on the construction to be put upon the stat. 1 & 2 Vict. c. 110, s. 9; which

(a) 7 T. R. 7.

(b) 2 C. & M. 215; 2 Dowl. P. C. 251.

(c) 6 Dowl. P. C. 476.

(d) 6 Scott, 895; 7 Dowl. P. C. 153.

I apprehend must be construed according to the ordinary meaning of the words employed in it, unless such a construction leads to some practical absurdity, or contrariety. We are to construe the words as we find them,—adding nothing to them, detracting nothing from them. [His Lordship read the clause.] The attesting attorney, therefore, must be “expressly named” by the defendant. But we cannot therefore suppose that it was intended that the defendant must expressly pronounce at length the christian and surname of the attorney; but he must be *expressly* named by him, in contradistinction to his being *impliedly* named or adopted. There is not a word to lead to the conclusion that he must be *originally* or *spontaneously* named by the party, or to exclude the suggestion of a name by a third person. What then is there to exclude the suggestion of a name by the plaintiff’s attorney? I cannot import such words into the act, when no such prohibition is expressed in it. It must not, undoubtedly, be the plaintiff’s attorney himself who is named by the defendant, because it is impossible that the same person can be, for such a purpose, the attorney both of the plaintiff and the defendant, acting for two adverse interests at once; and to that extent, therefore, we must modify the words of the act of Parliament. But if the defendant bonâ fide agree to accept as his attorney a person named by the plaintiff’s attorney, and use his services accordingly, that will be sufficient. That was the rule laid down in *Bligh v. Brewer*, in which all the previous cases on this subject were considered; and I am not aware that the authority of that decision has ever been called in question. Then, when the attorney has been really named by the defendant, he is there only for the purpose of informing him of the nature and effect of the instrument, if he requires it: he is not bound to read it over to him unless he desire him to do so; there is not a word in the act which makes such a duty imperative

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Esch. of Pleas, at all events; and therefore his not having done so in 1840.

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the present case, is not a ground for setting aside the instrument; and it is perfectly clear that the defendant fully knew what was the legal effect of the warrant of attorney, although he did not expect it would be put in force against him immediately, but relied on the forbearance of the trustees. We are, then, to look at the facts of this particular case, to see whether Crosseley was expressly named by the defendant to act as his attorney. [His Lordship stated the facts, and continued]: It appears to me, that these facts shew an express naming within the statute, and an attendance at the request of the defendant, within its provisions: the statute has, therefore, been complied with. The only effect of the suggestion of the name by the plaintiff's attorney would be, that looking at it in conjunction with the other circumstances of the case, it might become a matter of evidence to shew that the naming by and consent of the defendant had been fraudulently and improperly obtained; in which case the instrument would be void, not for non-compliance with the act of Parliament, but on the ground of fraud. But there is no pretence for imputing any fraud in the present case; it is clear that the defendant knew perfectly the nature and legal effect of the instrument. We must adhere to the authority of *Bligh v. Brewer*, which is expressly in point on the present occasion; and following up the authority of that case, I think we must hold it a sufficient compliance with the statute, if the attesting attorney be expressly named by the defendant, although his name may have been originally suggested by the plaintiff's attorney.

ALDERSON, B.—I am of the same opinion; it seems to me that the act has been complied with in substance. The attorney was named by the defendant, his name having been acceded to by him after it was suggested by the

plaintiff's attorney, and he having been expressly accepted by the defendant, when asked if he wished that he should act in his behalf. The act has been complied with, unless we incorporate into it words which are not to be found in it, viz. that the attorney must be named by the defendant *originally*, and without the suggestion of any other person. The Court would, indeed, be ready to look at the fact of such a suggestion, as a circumstance tending to shew fraud; but here there was no fraud whatever, because it is clear that the party knew the purpose and effect of the instrument before, only he did not think it would be put in force against him so immediately; nor probably would it, if the trustees had not ascertained that he had committed an act of bankruptcy.

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GURNEY, B.—The effect of the suggestion of a name by the plaintiff's attorney is a good ground for watching the case more narrowly, but the act does not require that the name should originate with the defendant, if the attorney be expressly adopted by him. Here it appears that he was, and therefore the rule must be discharged.

ROLFE, B.—I am of the same opinion. It is clear the act has been *literally* complied with, because the attorney was expressly named by the defendant: but it is said the *spirit* of the act has not been complied with, because the defendant was not informed *by him* of the nature and effect of the instrument: but the very same thing might occur when the attorney was expressly and originally named by the defendant.

Rule discharged, with costs.

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SANDERSON *v.* WESTLEY and WATERS (*a*).

Where, on the execution of a warrant of attorney, one attorney only was present, and attested it on behalf of the defendant, who had acted on previous occasions for the plaintiff, and who made out his bill for the obtaining and preparation of the warrant of attorney to the plaintiff, the Court held that he was not such an attorney "attending on behalf of the defendant," as to satisfy the 1 & 2 Vict. c. 110, s. 9, and set aside the warrant of attorney.

THESIGER had obtained a rule on behalf of the defendant, Miss Elizabeth Waters, calling on the plaintiff to shew cause why the warrant of attorney for £450, given by her in this cause, and the judgment and execution thereon, should not be set aside, on the ground of a non-compliance with the requisites of the statute 1 & 2 Vict. c. 110, s. 9. It appeared from the affidavits, that the defendant Westley, being pressed for payment of a debt of £450 owing by him to the plaintiff, applied to and prevailed upon the other defendant, who was his sister-in-law, to sign the warrant of attorney in question. The plaintiff suggested that Messrs. Walters & Reeve, who were Miss Waters's family attorneys, should prepare the warrant of attorney, but the defendant Westley said that they knew her affairs, and would not allow her to execute it. It was then agreed that a Mr. Goddard, an attorney, who had on previous occasions done business for the plaintiff, should prepare it, and attest it on her behalf, which he accordingly did at his office, to which the parties went for that purpose. No other attorney was present on behalf of the defendants. Goddard made out his bill for obtaining and preparing the warrant of attorney, and for all the negotiations in the course of the business, in the plaintiff's name, and all the items were charged to him, but it was delivered to and paid by the defendant Westley. The plaintiff, in his affidavit, stated that the defendants, "or one of them," desired to have the warrant of attorney prepared and attested by Goddard, but it did not expressly appear who first suggested his name.

Platt shewed cause.—This case does not fall within the principle of *Mason v. Kiddle* (*b*), which will be relied on

(*a*) This case was decided in as referring to the same subject as Easter Term, but is inserted here the last.

(*b*) 5 M. & W. 513.

for the defendant. Here it does not appear that Mr. Goddard was the attorney for the plaintiff, and he acted in the matter on the express employment of the defendants. *Haigh v. Frost* (a) was a case much resembling the present in its circumstances, and there the Court held the instrument to have been executed in conformity with the statute. [Parke, B.—There the Court considered that the party was never, in the course of the transaction, anything but attorney for the defendant; and that might be, because a plaintiff may take a warrant of attorney without having an attorney present on his part. The only question is, whether it sufficiently appears here that Goddard was not attorney for the plaintiff.]

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Thesiger (*Petersdorff* with him), contra.—It is sworn, and not denied, that Goddard had on previous occasions acted for the plaintiff; he makes out his bill in the plaintiff's name, and charges all the items to him; and he does not pretend to say he had previously had any communication whatever with the defendant Miss Waters. It is clear he was the attorney of the plaintiff to obtain these securities. Can it be said he was such an attorney as is contemplated by the act, in order to protect the interests of this defendant?—He was then stopped by the Court.

PARKE, B.—We are all of opinion that Goddard was the attorney of the plaintiff, prior to his being employed by the defendant, and was his attorney in this transaction. If so, the act is not complied with, since it requires that there should be a separate attorney employed by the defendant, to take care of his interests only. With respect to the case of *Haigh v. Frost*, that was no wrong decision in point of law; because there was no attorney for the plaintiff, and it is not necessary that he should have an attorney present on his behalf.

(a) 7 Dowl. P. C. 743.

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ALDERSON, B.—Wherever there is but one attorney present, it ought to be perfectly clear that he is not the plaintiff's attorney. In the case cited, I should probably have come to the same conclusion, upon the particular facts of that case.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

CHAPMAN and Others v. TOWNER.

By a memorandum of agreement, the plaintiff agreed to let to the defendant, and the defendant agreed to take, a house &c., from the 24th June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years: that the lease to be granted by the plaintiff was to contain a covenant on her part for the defendant to purchase the fee simple for £800 at any time within the first seven years of the said term to be granted; and a covenant on

ASSUMPSIT.—The declaration alleged, that the defendant, in consideration of his having become tenant to the plaintiffs of a certain dwelling-house, promised to pay them the yearly rent of £35 by quarterly payments, and it averred that 26*l.* 5*s.* had become due for rent for three quarters of a year, and assigned as a breach the non-payment of that sum.

Plea, as to 8*l.* 15*s.* parcel of the said sum of 26*l.* 5*s.*, being one quarter's rent, payment into Court of that sum, and as to the residue, non assumpsit.

The plaintiffs replied by taking the sum of 8*l.* 15*s.* out of Court, and joined issue on the other plea.

At the trial before Lord *Denman*, C. J., at the last Summer Assizes for Sussex, it appeared that the plaintiff and defendant had entered into the following agreement:—

“Memorandum of an agreement made this 24th day of April, 1831, between Mary Chapman, of Took's Court, in

the part of the defendant for payment of the rent of £35, payable quarterly, clear of all deductions for taxes whatsoever; and that the insurance on the sum of £500 was to be paid by the plaintiff, and to be repaid by the defendant as an increased rent: to lay out within twelve months the sum of £100 on the said premises; to keep the premises in substantial repair; and all other usual covenants as in leases of houses in B.; and that the defendant should execute a counterpart of lease when tendered to him by the solicitor of the plaintiff, and that the expense of the lease and counterpart was to be borne and paid by the defendant:—*Held*, that this was an agreement for a lease, and not an actual demise, and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing.

the parish of St. Andrew, Holborn, in the county of Middlesex, on behalf of herself and her two sisters, Catherine Chapman and Louisa Chapman, as administratrix of the estate of their late father, Mr. Richard Innock Chapman, of the one part, and William Towner, of Brighthelmston, in the county of Sussex, ironmonger, of the other part, as follows:—The said Mary Chapman, on behalf of herself and her two sisters, agrees to let to the said William Towner, and the said William Towner agrees to take, a house, No. 41, Western Road, Brighthelmston aforesaid, with the appurtenances, from the 24th day of June now next ensuing, for the term of twenty-one years, determinable at seven and fourteen years. That the lease to be granted by the said Mary Chapman and her two sisters, is to contain a covenant on their part for the said William Towner to purchase the fee-simple for £600 at any time within the first seven years of the said term to be granted, and a covenant on the part of the said William Towner for payment of the rent of £35 payable quarterly, clear of all deductions for taxes whatsoever, and that the insurance on the sum of £500 is to be paid by the said Mary Chapman, and to be repaid by the said William Towner as an increased rent; to lay out within twelve months the sum of £100 on the said premises; to keep the premises in substantial repair, and all other usual covenants as in leases of houses in Brighton; and that the said William Towner shall execute a counterpart of lease when tendered to him by the solicitor of the said Mary Chapman, and that the expense of the lease and counterpart is to be borne and paid by the said William Towner.

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WILLIAM TOWNER.

MARY CHAPMAN.

Witness,

RICHARD THOMPSON."

It was proved at the trial that the defendant quitted the premises at the expiration of the first seven years, without giving any notice to quit. There was also evidence that, before the defendant quitted, he had made a proposition to

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the landlord to purchase the fixtures which he, the defendant, had put up during his occupation of the premises, and the fixtures were accordingly valued, but the parties did not agree. The learned Judge was of opinion that no notice was necessary, and directed the jury to find a verdict for the defendant, giving the plaintiffs liberty to move to enter a verdict for 17l. 10s. if the Court should be of opinion that notice to quit ought to have been given.

Channell having, in Michaelmas Term last, obtained a rule accordingly,

Ball and Petersdorff now shewed cause.—This instrument operated as a present demise. The essential clause in it is this—"The said Mary Chapman agrees to let to the said William Towner, and the said William Towner agrees to take, a house &c. for the term of twenty-one years, determinable at seven and fourteen years." Now that, it is submitted, clearly operates as a present demise; and there is no obligation on the part of the tenant to make any formal communication to the landlord that he shall elect to determine the tenancy at the end of the first seven years. No notice was therefore necessary. It is to be treated as a lease for seven years certain, and in such a case the tenancy would terminate by effluxion of time at the end of that period. But supposing the Court should be of opinion that some act should be done to determine the tenancy, there was evidence here to shew that the landlord had been aware of the defendant's intention to quit, as a proposition had been made to purchase the fixtures. This instrument clearly operated as a lease for seven years; and if so, no notice to quit was necessary: but even if some notice were necessary, there were here circumstances to shew that notice had been given, though not formally. Wherever an option of this kind is given, if the construction of it be doubtful, it ought to be in favour of the lessee, as it must

be taken most strongly against the grantor. In *Dunn v. Sparrier* (a), it was held that if a lease be granted for seven, fourteen, or twenty-one years, the lessee has the option at which of those periods the lease shall determine. That case came afterwards for consideration before the Court of King's Bench, in *Doe d. Webb v. Dixon* (b), where it was completely upheld, on the principle that where the words of a grant are doubtful, they must be construed in favour of the grantee. Then is the option to be determined by notice? Nothing is there said about notice. The case of *Goodright v. Richardson* (c) may be relied upon, but this point was not there decided, as in that case notice was given. [Gurney, B.—The Court held that reasonable notice was necessary. Alderson, B.—According to the principle laid down in that case, the moment the second period arrives, no notice being given in time, it becomes a lease for the second period; so here, the moment the seven years had expired without notice, it would become a lease for fourteen years.] Where the tenant remains in possession even a day after the expiration of the first seven years, it is admitted that it would be so; because then he does an act which determines his option to remain; but here the fixtures were valued and the key taken by the landlord, which was an act done by which notice was waived.

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Platt and Channell, contra, were stopped by the Court.

PARKER, B.—We think this instrument amounts only to an agreement for a lease. No doubt, if there are words of present demise, if the instrument shews it to be the intention of the landlord that the premises shall be enjoyed by the tenant immediately, or at a future specified day, upon certain terms, a demise is thereby created, and a stipulation that a lease shall be afterwards prepared, does not prevent

(a) 3 B. & P. 399.

(b) 9 East, 15.

(c) 3 T. R. 462.

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its so operating. Here there are words which, in their ordinary sense, are those of agreement only, but may operate, unquestionably, as words of present demise—and frequently do so operate; but in this case the contract shews that they are used as words of agreement only: for the amount of rent, the periods of payment, and other terms of holding, are not mentioned, except as they are to be contained in a lease which is to be prepared. There is, therefore, no complete demise, independently of that lease. A lease is to be made absolutely and at all events, and not at the request of the party, and a counterpart is to be executed by the defendant. It is to be observed, also, that the instrument does not, as in many other cases, import that it shall be binding as a lease until a lease is actually executed; and, on the whole, it appears to us that it was intended to operate as an agreement only for a future lease. Therefore, when the defendant entered, he was only tenant at will until he paid rent, and he then became tenant from year to year; and that tenancy could only be determined by notice to quit given six months before the time of his entry, or by surrender in writing.

ALDERSON, B.—One mode of ascertaining whether an instrument is to be treated as a lease or an agreement, is by looking to the inconvenience which would result from treating it as a lease. This lease is to contain “all other usual covenants as in leases of houses in Brighton.” Now we cannot tell what those usual covenants are. A difficulty arises from the omission to expand the terms of the holding upon the face of the instrument.

GURNEY, B., concurred.

Rule absolute.

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PARMITER v. COUPLAND and Another.

THIS was an action on the case for a series of libels published of the plaintiff, the late mayor of the borough of Winchester, in the Hampshire Advertiser newspaper, between the 17th of November, 1838, and the 2nd of March, 1839, imputing to him partial and corrupt conduct, and ignorance of his duties, as mayor and justice of the peace for the borough. The defendants pleaded not guilty. At the trial before *Coleridge, J.*, at the last Winchester Assizes, the learned Judge, in the course of his summing up, stated to the jury that there was a difference with regard to censures on public and on private persons; that the character of persons acting in a public capacity was to a certain extent public property, and their conduct might be more freely commented on than that of other persons: and having told the jury what, in point of law, constituted a libel, he left it to them to say whether the publications in question were calculated to be injurious to the character of the plaintiff. The jury having found a verdict for the defendants,

In an action for libel, the Judge is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition; and, as incidental to that, whether it is calculated to injure the character of the plaintiff.

A publication may be a libel on a private person, which would not be any libel on a person in a public capacity; but any imputation of unjust or corrupt motives is equally libellous in either case.

Erle, in last Michaelmas Term, obtained a rule nisi for a new trial, on the grounds, (amongst others), 1st, that the learned Judge ought to have directed the jury that, in point of law, the publications complained of were libels on the plaintiff; and, secondly, that it was a misdirection to state to them any distinction as regarded publications relating to public and to private individuals. In this term,

Crowder appeared to shew cause, but the Court, after the report of the learned Judge had been read, called upon

Erle and *Butt* to support the rule. The learned Judge misdirected the jury, in not stating to them, as matter of

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law, that these publications amounted to libels. When *words spoken* are complained of as defamatory, the only questions for the jury are, (supposing them to be proved as laid), whether they apply to the plaintiff, and whether the meaning ascribed to them in the innuendoes is made out by the evidence: and a different principle cannot be applied to oral and to written slander. The words here complained of were clearly actionable if spoken; and the Judge would in such case have been bound to tell the jury, that if they were meant in their ordinary sense, the plaintiff was entitled to recover. It has been often entertained as a question of law by a Court of Error, whether a particular writing amounts to a libel. In *Wright v. Clement* (a), a declaration stating that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, *in substance as follows*, was held bad in arrest of judgment, on the ground that *the Court* must judge whether the words set out constituted a ground of action or not. [*Alderson, B.*—That is for the benefit of the defendant; the Court are to see whether, in any reasonable sense, the words may be innocent.] If the Court are so to judge for the defendant, whether it be a libel or not, so must they also for the plaintiff. [*Alderson, B.*—That does not follow.] *Holroyd, J.*, there says—"It is clear, that when it can be shewn distinctly what the instrument is upon which the whole charge depends, that instrument must be shewn to the Court, in order that *they* may form their judgment." [*Alderson, B.*, referred to *Chalmers v. Payne* (b).] Where the libel is in a foreign language, if a translation of it only be set forth, the judgment will be arrested: *Zenobio v. Aztel* (c). If the defendant demurs to the declaration, then it clearly becomes a question of law. [*Alderson, B.*—Then he admits a *malicious* publication. *Parke, B.*—The practice used to be as you say before Mr. Fox's Act (d).] That

(a) 3 B. & Ald. 503.

(b) 3 T. R. 428, n.

(c) 6 T. R. 162.

(d) 32 Geo. 3, c. 60.

act is expressly confined to criminal cases. [*Parke, B.*—*Resol. of Pleas, 1840.*
It is true; but it has been the constant practice, in recent times, for the Judge to define what is a libel, and then to leave it to the jury, first, whether the writing complained of was published by the defendant; secondly, whether it fell within the definition of the offence.] *Lord Mansfield* distinctly laid it down, in the case of *Rex v. Dean of St. Asaph (a)*, as a general rule applicable to all cases where, by the form of the pleadings, the questions of law and fact can be severed, that the jury have no jurisdiction to decide upon the law. Where, indeed, the words may be controlled by the context, or are capable of more than one meaning, the question must be left to the jury; but here there is nothing whatever to throw any ambiguity upon the meaning of these paragraphs. [*Parke, B.*—In criminal cases, the Judge is to define the crime, and the jury are to find whether the party has committed that offence. Mr. Fox's Act made it the same in cases of libel, the practice having been otherwise before.] In the next place, it was a misdirection to state to the jury that there was a distinction as to libels on a person in a public capacity. No man has a right to impute to another, whether filling a public capacity or not, injustice or corruption.

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Crowder, contra, was not called on to argue the above points.

PARKER, B.—The verdict is unquestionably wrong, and there ought to be a new trial, but on the ground of its being a wrong verdict only. I think there was no misdirection on the part of the learned Judge. One of the grounds upon which this rule was obtained, was, that the learned Judge ought to have told the jury that the terms of these papers were libellous, and not to have left that as a question of fact for them to determine. But it has been

(a) 2 C., M., & R. 156.

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the course for a long time for a Judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution, or civil action. A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact. The Judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's Libel Bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases.

I also think that there was no misdirection in the other part of the learned Judge's summing up, to which an objection was raised. There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander: but any imputation of wicked or corrupt motives is unquestionably libellous; and such appears to be the nature of the publications here. I do not find that the learned Judge stated otherwise: we cannot therefore grant a new trial, as for a misdirection.

ALDERSON, B.—I entirely concur. The first question is, whether the learned Judge ought to have laid it down positively, that if the publications were proved, and the words were used in their ordinary sense, the jury must

find that they were libels. I think it would not be correct so to do; but that he ought—having defined what is a libel—to refer to the jury the consideration of the particular publication, whether falling within that definition or not. I think that if he were to take it upon himself to say that it was a libel, he would be wrong in doing so.

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As to the other point, there certainly is a material distinction between a publication relating to a public and a private person, whether they *be* libels. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual. The same thing might be no libel on me, which might be a very grievous and injurious libel on another. There may be, and I think in this case there was, no real difference between the two cases, but that this was a libel on the plaintiff in whatever capacity. But I think the learned Judge right in the general observation, although I might differ with him in its application to the particular case. Probably, indeed, he applied it only to the question as to the amount of damages. It is however sufficient to say, that it does not appear to me to be a misdirection.

GURNEY, B., concurred.

Rule absolute, on payment of costs.

MARSHALL v. LYNN.

ASSUMPSIT.—The first count of the declaration alleged, that the defendant theretofore, to wit, on the 15th of December, 1838, bargained for and bought of the plaintiff, and the plaintiff at the request of the defendant then sold to the defendant, a large quantity, to wit, as many potatoes by parcel; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing.

The terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds, cannot be varied or altered by parol.

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atoes as would load a certain brig or vessel of the plaintiff called the *Kitty*, that is to say, from sixty to seventy lasts, to be shipped on board the said vessel *on her next arrival at the port of Wisbech*, in the county of Cambridge, the said potatoes to consist of what pink kidneys the said plaintiff then had, and the residue to consist of round, white, and blue potatoes, and to be paid for at the rate or price of 4s. 6d. per sack for each and every sack of the said pink kidneys, and at the rate or price of 4s. 8d. per sack for each and every sack of the said round, white, and blue potatoes, of fifteen stones net merchants' ware, to be delivered by the plaintiff to the defendant free on board the said brig or vessel, and to be paid for by the said defendant on such delivery thereof as aforesaid. The declaration then, after alleging mutual promises for the performance of the terms of the contract, and averring the arrival of the *Kitty* at Wisbech on the 25th of December, 1838, the same being her *next* arrival after the making of the agreement, averred, that he the plaintiff has always on and after such arrival of the said brig or vessel as aforesaid, been ready and willing, and then tendered and offered to ship the said potatoes free on board the said brig or vessel, and to deliver the said potatoes to the defendant according to the terms of the bargain and sale; but that the defendant then wholly discharged the plaintiff from making such shipment and delivery, and then requested the plaintiff to delay such shipment and delivery until the said brig or vessel should have made a certain other voyage from the port of Wisbech, and should have again arrived at the said port of Wisbech on her return from such last-mentioned voyage, to which said last-mentioned proposal and request of the said defendant the plaintiff then consented and agreed; and thereupon, in consideration of the last-mentioned premises, and that the plaintiff at the like request of the defendant had then promised the defendant to ship and deliver the said potatoes to the defendant, according

to the said last-mentioned proposal and request of the said defendant, the said defendant then promised the plaintiff to accept the said potatoes of and from the plaintiff, and to pay him for the same, on the delivery thereof to the defendant as last aforesaid. And the plaintiff in fact says, that the said brig or vessel of the plaintiff did afterwards, and after the making of the last-mentioned promise, to wit, on the 1st of February, 1839, arrive at the said port of Wisbech on her return from the said last-mentioned voyage as aforesaid, of which the defendant afterwards, to wit, on the 8th of February, 1839, had notice; and although the plaintiff was afterwards, and within a reasonable time after the said 1st of February, to wit, on the 8th of February, 1839, ready and willing, and then tendered and offered to ship the said potatoes free on board the said brig or vessel, and to deliver the same to the defendant upon the terms aforesaid, of which said last-mentioned premises the defendant then had notice, and was then requested by the plaintiff to attend to such last-mentioned shipment, and to accept and pay for the said potatoes on the terms aforesaid: yet, that the defendant, not regarding his said last-mentioned promise, did not nor would, at the said time when he was so requested, or at any time before or afterwards, accept the said potatoes, or any part thereof, of or from the plaintiff, or pay him for the same at the rate aforesaid or otherwise, but then wholly refused so to do:—concluding with an averment of special damage in respect of the keeping and selling of the potatoes.

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There were also counts for freight, demurrage, goods sold and delivered, and for money found to be due upon an account stated.

Pleas, 1st, non assumpsit; 2ndly, as to the first count, that the defendant was always, from the time of the arrival of the said brig or vessel at the said port of Wisbech, on her return from the said last-mentioned voyage in the said first count

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mentioned, hitherto, ready and willing to accept the said potatoes of and from the plaintiff, and pay him for the same on the delivery thereof as aforesaid, and then would have attended to the shipment and delivery thereof, according to the said notice and request of the plaintiff in the said first count mentioned, and would have accepted and paid for the said potatoes upon the terms in the said first count mentioned, but that the plaintiff, immediately after the said second arrival of the said brig or vessel as aforesaid, and the giving such notice and the making such request as aforesaid, and before a reasonable time for the defendant's complying with the said notice and request had elapsed, and before the defendant could attend to such shipment and delivery as aforesaid, to wit, on the said 8th of February, 1839, aforesaid, without the consent or knowledge of the defendant, wrongfully shipped the said potatoes on board the said brig or vessel, and consigned, and carried and conveyed away the same to certain places to the defendant unknown, and wrongfully prevented the defendant from attending to the shipment and delivery of the said potatoes, and from accepting the same according to the said agreement in the said first count mentioned, and wholly discharged and hindered the defendant from the performance of the said agreement and promise so made by him as aforesaid.

Replication, *de injuriâ*.

At the trial before *Vaughan, J.*, at the last Summer Assizes for Cambridge, it appeared that on the 15th of December, 1838, the plaintiff and defendant entered into a written contract, of which the following is a copy :—

“ Wisbech, 15th December, 1838.

“ Bought of Mr. Thomas Marshall, as many potatoes as will load his brig the *Kitty*, Captain William Scott, say from sixty to seventy lasts, to be shipped on board the above vessel on her arrival here the next time—say what pink kidneys he has at 4*s.* 6*d.* per sack, and the round, white,

and blue ones at 4s. 3d. per sack, of fifteen ounces net merchants' ware, free on board the said ship—payment, cash on delivery.

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On the 25th of December, the Kitty arrived at Wisbech, that being the next arrival after the making of the contract, and on the following day, the plaintiff's son informed the defendant that the Kitty would be ready to take in the potatoes on the 28th, when the defendant requested that the plaintiff would let the vessel go to Lynn and load a cargo of potatoes which he had purchased there, and for which he could not obtain a vessel, and take them to London; and he then promised the plaintiff to take the plaintiff's potatoes the next time the Kitty came to the port of Wisbech. This proposal was agreed to, on the understanding that the plaintiff's potatoes should be taken the next time the Kitty came. In pursuance of this arrangement, the Kitty sailed to Lynn, and, after proceeding to London, and there discharging her cargo, she returned to Wisbech, and arrived there on the 7th of February. On the 8th of February the vessel was ready to receive the potatoes, of which the defendant had full notice, and was requested to take them; but the defendant said he could not take them then, nor did he know when he could; and he ultimately declined taking them. They were afterwards shipped to London, and there sold by the plaintiff, who brought this action to recover the loss sustained by the defendant's non-performance of the contract. It was contended at the trial, on the part of the defendant, that the alteration in the time fixed by the terms of the original contract for shipping the potatoes was a variation of it in a material part, and ought to have been in writing. The learned Judge directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a

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Kelly and Gunning now shewed cause.—A contract for the sale of goods to an amount exceeding £10 must be in writing, by the provisions of the Statute of Frauds; but that statute does not require either the time, or the particular mode, of the delivery of the goods to be in writing, and in this case there was a sufficient memorandum of the contract for the sale. This case falls strictly within that case of *Cuff v. Penn* (a), and is distinguishable from *Goss v. Lord Nugent* (b), which was decided upon the 4th section of the Statute of Frauds, and in which the distinction between that section and the 17th is recognised. The Court did not there decide whether *Cuff v. Penn* was good law or not, though undoubtedly *Parke, J.*, in the course of the argument, appears to have doubted the correctness of that decision. No doubt, a written contract cannot be contradicted by parol, but it may be varied or discharged by parol, where there is no statutable provision to prevent it. The 17th section enacts, “that no contract for the sale of any goods, wares, and merchandizes for the price of £10 or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” That is, that no contract shall be binding for the sale of goods, unless it be in writing: it is not material that the time stipulated for their delivery should be in writing, as that is not a material part of the contract of sale. The object of the statute was to guard the public against evidence of a contract being given, when no contract has been entered into at all; but where there

(a) 1 M. & Selw. 21.

(b) 5 B. & Adol. 58.

is evidence of some written contract, that is sufficient, without setting out the whole of the contract. If it is held to be material that every particular of a contract is to be inserted, and that it cannot be varied from afterwards, the consequences will be most serious. Suppose, in the case of a sale of wines, the seller enters into a written contract to deliver the wine at 28, Grosvenor Street, and it turns out, on inquiry, that the purchaser lives at No. 30, is he to be at liberty to repudiate the contract on that ground, after having subsequently requested that the wine should be delivered at No. 30? That would be a variation as to the place; then as to the time:—suppose a gentleman, living out of town, enters into a written contract, by which goods are to be sent by a particular coach, as, for instance, the ten o'clock coach, but he afterwards requests them to be sent by the eleven o'clock coach, because he is going by that coach, can it be said that that would avoid the contract? Such a circumstance as that last mentioned is of frequent occurrence, and is done for the convenience of the purchaser. To say that such a slight variation from the written contract, agreed to subsequently by parol, would render it nugatory, would lead to the greatest injustice. In *Cuff v. Penn*, Lord *Ellenborough* says, “The principal design of the Statute of Frauds was, that parties should not have imposed upon them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase.” . . . “But here, what has been done is only in performance of the original contract. It is admitted that there was an agreed substitution of other days than those originally specified for its performance; still the contract remains.” Now that is precisely the present case: there, one day was substituted for another; here, one of the ship's voyages was substituted for another. The case of *Warren v. Stagg*, cited in *Littler v. Holland (a)*, shews that the time of delivery is not a material part of the contract,

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and, if varied by subsequent agreement, it is to be considered only as a continuation of the first contract. And in *Hoadly v. M'Laine* (a) it was held, that where an executory contract is entered into for the fabrication of goods, without any agreement as to the price, the memorandum of the contract, required by the Statute of Frauds, is sufficient without specification of price. That shews that the statute does not require every term of the contract to be in writing. [Parke, B.—No doubt, every particular of the contract need not be mentioned; but if mentioned, it must be observed. I do not apprehend you can go into a distinction between the material and the immaterial parts of the contract. How can you tell what part of a contract is material, and what not? The recent case of *Stead v. Dawber* (b) appears to have entirely overturned the authority of *Cuff v. Penn.*] That case is distinguishable from the present, as there the goods were of a fluctuating value, the price was not mentioned, and therefore the time of delivery was of the essence of the contract. In this case, the price of the goods was fixed by the contract.

Storks, Serjt., contra, was stopped by the Court.

PARKE, B.—I am of opinion that this rule ought to be made absolute. If it had not been for the decision in the case of *Stead v. Dawber*, I should have wished to hear the argument on the other side, and probably to have taken time to consider; but as the case of *Cuff v. Penn.*, which had before been very much doubted, appears to have been overruled by *Stead v. Dawber*, we do not think it necessary to do so. Here there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of their delivery was subsequently made by parol; and the point to be decided is, whether such an alteration, by parol, of the written contract, can be binding. It appears to me that it cannot; and that the same rule

(a) 10 Bing. 482; 4 M. & Scott, 340.

(b) 2 P. & D. 447.

must prevail as to the construction of the 17th section of the Statute of Frauds, which has already prevailed as to the construction of the 4th section. The decision in *Goss v. Lord Nugent*, the principle of which I have no doubt is perfectly correct, has clearly established, with respect to the case of a contract relating to the sale of an interest in lands, that if the original written contract be varied, and a new contract, as to any of its terms, substituted in the place of it, that new contract cannot be enforced in law, unless it also be in writing. The question is, whether the same reasoning does not apply to a contract for the sale of goods, under the 17th section. [His Lordship read that section.] It appears to me that no distinction can be made: and I must also observe, that it seems to me to be unnecessary to inquire what are the *essential* parts of the contract, and what not, and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material; and perhaps, therefore, the latter part of the judgment in *Stead v. Dawber* may be considered as laying down too limited a rule. Every thing for which the parties stipulate as forming part of the contract must be deemed to be material. Now, in this case, by the original contract, the defendant was to accept the goods, provided they were sent by the first ship: the parties afterwards agreed by parol that the defendant would accept the goods if they were sent by the second ship, on a subsequent voyage: that appears to me to be a different contract from what is stated before. Such was my strong impression, independently of any decision on the point: but the case of *Stead v. Dawber* is precisely in point with the present, and on looking at the judgment, it does not appear to proceed altogether upon the time being an *essential* part of the contract, but on the ground that the contract itself, whatever be its terms, if it be such as the law recognises as a contract, cannot be varied by parol. It has been said that the adoption of this rule will produce a great deal of inconvenience; I am not, however, aware of much

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practical inconvenience that can result from it, and none that furnishes any reason for altering the rule of law in respect of these mercantile contracts. They frequently vary in terms, and admit of some latitude of construction, but the expressions used in them generally indicate the intention of the parties sufficiently well; there is a sort of mercantile short-hand, made up of few and short expressions, which generally expresses the full meaning and intention of the parties. On the whole, it appears to me that no reasonable distinction can be made between this case and that of *Goss v. Lord Nugent*. This is a new contract, incorporating new terms, and I think it cannot be enforced by action, unless there is a note in writing, expressing those new terms distinctly, or in the mercantile phraseology which, as I have already said, admits of some latitude of interpretation. This action, therefore, cannot be maintained, and a nonsuit must be entered.

ALDERSON, B.—I am of the same opinion, and entirely concur with what has fallen from my brother *Parke*. By the 4th section of the Statute of Frauds, it is provided that the contracts therein mentioned shall be in writing, otherwise no action shall be maintained on them. The 17th section requires that some note or memorandum in writing of the bargain before made, shall be signed by the party to be charged by such contract, or his agent lawfully authorized. There is undoubtedly a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section, it is sufficient if all the terms by which the defendant is to be bound are stated in writing, so as to bind him. Now here there is a stipulation which is to bind the defendant, and it is proposed to alter that by parol, which cannot be done. It is much better plainly to define what the law is, than to attempt to create fanciful distinctions. Here there is, as to one of the terms

by which the party is to be bound, entirely a new contract, and the law requires that such new contract should be in writing.

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GURNEY, B.—I am of the same opinion. This is a new contract, and the law which requires the one contract to be in writing, requires the other to be in writing also.

ROLFE, B., concurred.

Rule absolute.

BROWN v. TAPSCOTT.

INDEBITATUS assumpsit in the sum of 22*l.* 10*s.* for money paid by the plaintiff for the use of the defendant; with a count upon an account stated. Plea, non assumpsit.

The plaintiff and defendant, together with others, entered into and signed the following special contract:—"Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter, by means of a small steam-boat, we hereby authorize Mr. G. A. B. to charter the Brockelbank, or any other suitable

At the trial before Lord Denman, C. J., at the Summer Assizes for the county of Kent, it appeared that the plaintiff, who was a shareholder in certain steam navigation companies, having been applied to by several tradesmen residing at Herne Bay, to charter a steam-boat to run from London to that place and Margate, the following agreement was in consequence drawn up:—

"Being desirous that the communication between London, Herne Bay, and Margate, should be kept open dur-

vessel, for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprize, according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid £10 per cent. on the amount of our subscriptions, and we hereby bind ourselves, and agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively:—"Held, that this agreement constituted a partnership between the parties who signed it; and that the plaintiff, who had paid such debts arising from the undertaking as the earnings of the boat were insufficient to satisfy, could not maintain an action for money paid, against the defendant who had not paid up his subscription, but that the proper form of action was a special action of assumpsit for the non-performance of the undertaking to pay the plaintiff the instalments from time to time.

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ing the ensuing winter by means of a small steam-boat, we hereby authorize Mr. George Augustus Brown to charter the Brockelbank, or any other suitable vessel, for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole, or such part, of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprize according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid £10 per cent. on the amount of our subscription, and we hereby bind ourselves, and agree to pay to Mr. Brown such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat be not sufficient to pay the expenses: it being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively.

“ Herne Bay, 30th October, 1837.”

This instrument was signed by 22 persons, including Brown the plaintiff, and Tapscott the defendant, the former subscribing for £50, and the latter for £25.

The plaintiff, pursuant to the terms therein mentioned, first chartered the Brockelbank, but the subscribers being desirous of having a better boat, he afterwards chartered the Dart, and subsequently the Red Rover, which vessels ran in succession to Herne Bay until the 30th of April, 1838, the end of the winter season. The expenses incurred and paid by the plaintiff considerably exceeded the earnings of the boats, and it became necessary to call for further instalments, from time to time, during the progress of the enterprize. At the time of signing the instrument, the defendant paid the sum of 2*l.* 10*s.*, being £10 per cent. on the amount of his subscription; and it was

proved by Mr. Rohrs, the secretary to the Herne Bay Steam Packet Company, that by the plaintiff's direction he had called upon the defendant, and had produced a rough sketch of the accounts, shewing the losses sustained, and the defendant had promised to send the amount of his second instalment, but had failed to do so.

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It was objected at the trial that the instrument was an agreement for a partnership between the plaintiff and the defendant for the object therein stated, and therefore that the action could not be sustained, as one partner could not maintain an action against his co-partner for work and labour performed or money expended on the partnership account, and *Holmes v. Higgins (a)* was cited. The learned Judge directed the jury to find a verdict for the plaintiff for the amount claimed, but gave the defendant leave to move to enter a nonsuit.

Platt having, in Michaelmas Term, obtained a rule accordingly,

Whateley and Wallinger shewed cause.—This instrument did not constitute a partnership between the parties, but was a mere authority to the plaintiff to carry on the undertaking, and the plaintiff was entitled to recover, to the extent of the defendant's subscription, the money he actually laid out for the defendant's benefit in carrying on the undertaking: *Helme v. Smith (b)*, *Coffee v. Brian (c)*. The case of *Holmes v. Higgins*, which was cited at the trial, is inapplicable, as there the plaintiff was liable as a partner jointly with the defendant for the claim in respect of which the action was brought. But assuming that the agreement had the effect of constituting a partnership between the parties, the question is, whether the defendant can avail himself of this defence under the plea of non assumpsit. The

(a) 1 B. & Cr. 74; 2 D. & R. 196. (b) 7 Bing. 709; 5 M. & P. 744.

(c) 3 Bing. 54; 10 Moore, 341.

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first rule of Hilary Term, 4 Will. 4, says, that the plea of non assumpsit shall operate only as a denial in fact of the express promise alleged, or of the matters of fact from which the promise alleged may be implied by law. The third rule enacts, that all matters in confession and avoidance, which shew the transaction to be either void or voidable in point of law, shall be specially pleaded. Now here there is an express promise, and the defendant seeks to get rid of it by saying, that it is either void or voidable on the ground of the existence of the relation of partnership between him and the plaintiff. There is an analogy between this case and that of infancy, which is one of the instances mentioned in the rule. [*Parke, B.*—There can be no doubt about the form of the plea, and that if it was a partnership transaction, it might be given in evidence under non assumpsit; but the question is, whether it is not an agreement at all events, to pay certain sums of money from time to time as they become due.] That is the effect of the agreement. This is no debt due to the plaintiff and defendant jointly, nor would the damages recovered go to or form part of the partnership fund: *Worrall v. Grayson* (a), *Bedford v. Brutton* (b). The case of *Venning v. Leckie* (c) shews that the necessity of looking into the accounts, in order to ascertain whether there had been profit or loss, is no objection to the maintenance of the action. The action is not brought to recover partnership profits, but monies laid out by the plaintiff, to enable the defendant to get such profits: *Gale v. Leckie* (d).

Platt and Channell, contra.—The effect of the agreement was to constitute a partnership between the parties, each party to be liable to a certain amount. *Holmes v. Higgins* (e) is directly in point. The money, if recovered,

(a) 1 M. & W. 166.

(c) 13 East, 7.

(b) 1 Bing. N. C. 399; 1 Scott, 245.

(d) 2 Stark. 107.

(e) 1 B. & C. 74.

would clearly belong to the partnership funds, and must be introduced into and form part of the partnership accounts.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action for money paid, with a count on an account stated. It appeared on the trial that the plaintiff, together with the defendant and others, entered into a special agreement to this effect: [the learned Judge here read the agreement.] The effect of this agreement was to constitute a partnership between those who subscribed, in proportion to their subscription. The plaintiffs took an active part in the management of the concern, and the earnings of the boat not proving sufficient, he paid the amount of the debts due to the different creditors; and if nothing else had been done, the plaintiff could not have recovered as for money paid to the partnership use, as one partner cannot sue another in that form of action for contribution to a joint partnership liability. But on this agreement, the plaintiff might have sued the defendant in a special assumpsit, for not performing his undertaking to pay the plaintiff the instalments from time to time, in addition to the £10 per cent., to form a fund, as such an action would lie, founded on the consideration of the plaintiff on his part undertaking to charter and manage the vessel, as much as an action would lie on a covenant in co-partnership articles by one partner to pay another a certain sum, if the partnership assets should prove deficient. As such an action, therefore, would lie, the only objection is to the form of the declaration. The count for money paid could not be supported. But it appears from my Lord *Denman's* note, that the earnings were admitted to be insufficient to pay the expenses; that application was made to the defendant by the plaintiff for the second

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 to be sufficient evidence to support the count on an account
 stated as to that sum, founded on the obligation to pay it
 arising out of the special contract; and therefore the rule
 to enter a nonsuit must be discharged.

Rule discharged.

JOHNSON v. REID.

The plaintiff
 was committed
 by the defend-
 ant, a magis-
 trate, under the
 4 Geo. 4, c. 34,
 s. 3, by a war-
 rant of commit-
 ment which was
 in the following
 form:—"To
 the constable of
 M., Surrey, &c.
 Whereas infor-
 mation and
 complaint hath
 been made unto
 me, one &c.,
 upon the oaths
 of J. H. and S.
 M., both of M.,
 in the said
 county of S.,
 calico-printers,
 that W. J., of
 M. aforesaid, in
 the county
 aforesaid, cali-
 co-printer,

TRESPASS against the defendant, a justice of peace for
 the county of Surrey, for assault and false imprisonment.

Pleas—1st, not guilty (by statute); 2ndly, a tender of
 £30 by way of amends. Replication to the second plea,
 taking issue on the sufficiency of the amends.

At the trial before Lord *Denman*, C. J., at the last
 Surrey Assizes, the plaintiff called as a witness the gover-
 nor of the house of correction at Brixton, who produced
 a warrant of commitment, signed by the defendant, in
 the following form:—

"To the constable of Mitcham, in the county of Surrey,
 and to the keeper of the house of correction at Brixton, in
 the said county of Surrey, &c. Whereas information and
 complaint hath been made unto me, one of her Majesty's
 justices of the peace in and for the said county, upon the
 oaths of Jonathan Haslam and Samuel Makepeace, both
 did on Wednesday, the 8th of May inst., contract with the said S. M., to print certain
 pieces of woollen cotton goods, and that the said W. J. had adopted such contract, and en-
 tered into the service of the said S. M. under such contract; and that the said W. J. hath,
 in his said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour to-
 wards the said S. M., and particularly with having, on the 9th of May inst., refused to per-
 form such contract, and left his said work unfinished, and the service of the said S. M.,
 without his license or consent. And whereas, in pursuance of the statute in that case made and
 provided, I have duly examined the proofs and allegations of both the said parties, touching the
 matter of the said complaint, and, upon due consideration had thereof, have adjudged and
 determined, and do hereby adjudge and determine, the said complaint to be true." It then com-
 manded the constable to convey the plaintiff to the house of correction, and deliver him to the
 keeper thereof, who was ordered to detain him in custody:—*Held*, that this was a commitment
 in execution, and that it was bad, because it did not shew, either that the contract was entered
 into, or the work refused to be done, or the plaintiff found, within the jurisdiction of the magistrate.

of Mitcham, in the said county, calico-printers, that Wm. Johnson, of Mitcham aforesaid, in the county aforesaid, calico-printer, did, on Wednesday, the 8th of May inst., contract with the said Samuel Makepeace to print certain pieces of woollen cotton goods; that the said Wm. Johnson had adopted such contract, and entered into the service of the said Samuel Makepeace under such contract; and that the said Wm. Johnson hath, in his said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour towards the said Samuel Makepeace, and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said Samuel Makepeace, without his license and consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true. These are therefore to command you, the said constable, forthwith to convey the said William Johnson to the said house of correction at Brixton aforesaid, and to deliver him to the keeper thereof, with warrant; and I do hereby command you the said keeper to receive the said William Johnson into your custody, in the said house of correction, there to remain, and be corrected and held to hard labour for the space of six weeks from the date hereof, and for so doing this shall be your sufficient warrant. Given," &c.

It was proved that the plaintiff was confined in the house of correction, under this warrant, for ten days, when he was discharged by habeas corpus. Other witnesses were also called to prove the damage sustained by the plaintiff; and it was elicited from some of them, that he was a journeyman calico-printer, and that such persons worked upon the premises of their employers, who supplied them there with blocks and materials necessary for performing their work; but it also appeared, that they

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were paid according to the quantity of work done, and not by the day or week. The defendant's counsel, on these facts being proved, submitted that the plaintiff ought to be nonsuited, as the commitment was a valid commitment under 4 Geo. 4, c. 34, s. 3, which gave the magistrate jurisdiction in the case. The plaintiff's counsel contended that this case was not within the act, and relied upon *Hardy v. Ryle (a)*. The Chief Justice left it to the jury to say whether the sum of £30 was a sufficient compensation, which they negatived by finding a verdict for the plaintiff for the sum of £45. The learned Judge thereupon gave leave to move to enter a nonsuit, or a verdict for the defendant on the first issue.—*Thesiger* having, in Michaelmas Term, obtained a rule accordingly,

Andrews, Serjt., (*Montagu Chambers* with him), now shewed cause.—This is a commitment in execution, under the stat. 4 Geo. 4, c. 34, s. 3, and must be construed with the same strictness as a conviction. By that section it is enacted, "That if any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service, according to his or her contract), (*such contract being in writing*, and signed by the contracting parties), or, having entered such service, shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanour in the execution thereof, or otherwise, respecting the same, then, and in every such case, it shall and may be lawful for any justice of the peace of the

(a) 9 B. & C. 603.

county or place where such servant in husbandry, artificer, calico-printer, handicraftsman, &c. &c., shall have so contracted, or be employed, or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, &c. &c., shall have so contracted, or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending such servant in husbandry, &c. &c., and to examine into the nature of the complaint; and if it shall appear to such justice that such servant in husbandry, &c. &c., shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanour as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction for a reasonable time, not exceeding three months." This conviction does not state such an offence as gave the magistrate jurisdiction within this act. The contract is not alleged to have been in writing, nor is it stated in what manner the entering into the service took place. Besides, the warrant is bad for omitting to shew that the offence was committed within the county in which the magistrate had jurisdiction. *Rex v. Hazell (a)*, *Rex v. Jeffries (b)*, *Rex v. Smith (c)*. It does not at all appear here where the offence was committed. Again, it does not allege that the party was present and was convicted. There ought to have been an adjudication that the plaintiff was convicted. A commitment in execution by a magistrate must state that the party has been *convicted*; and setting forth that he was charged on oath with the offence is insufficient. *Rex v. Cooper (d)*, *Rex v. Rhodes (e)*.—He was then stopped by the Court, who called upon

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Channell, contrà.—[*Parke*, B.—How do you answer the

(a) 13 East, 139.

(c) 8 T. R. 588.

(b) 1 T. R. 241.

(d) 6 East, 509.

(e) 4 East, 220.

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objection as to the venue?] It is not necessary that the offence should be committed within the county within which the magistrate had jurisdiction. It is sufficient if the party is *found* within the jurisdiction. [*Gurney, B.*—The commitment does not state that he was found within the jurisdiction.] Besides, this is only a commitment, and not a conviction, and it may be questionable whether it was enough for the plaintiff to produce the commitment, without shewing that there was a conviction which contained the same defects.

PARKE, B.—It does not appear here that there was any conviction, and that is not required by the statute. This is a commitment which was intended by the act to operate as a conviction; and it is defective, in not stating that the contract was entered into, the work not done, or the plaintiff found, within the jurisdiction of the magistrate. The warrant is the only authority to the gaoler to keep the plaintiff in custody, and in this warrant there is no authority shewn, and nothing stated which justifies the plaintiff's arrest on this charge. But taking it merely as a matter of evidence, it does not appear that the magistrate had authority; that the contract was entered into, the work refused to be done, or the man found, within his jurisdiction. This magistrate therefore had no defence.

ALDERSON, B.—I am of the same opinion; and I may add, that it is consistent with this warrant that the plaintiff never appeared before the magistrate at all.

GURNEY, B., concurred.

Rule discharged.

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SECCOMBE v. BABB.

IN this case the parties had agreed to refer all matters in difference on the record in the cause (except so far as related to a sum of £10) to two arbitrators, "the costs of the said action (except as aforesaid) and also of the reference and award incident thereto, to be in the discretion of the arbitrators." The arbitrators proceeded with the reference, and awarded that the action should cease, and no further proceedings be taken therein; that the defendant should pay to the plaintiff the sum of £50 towards the costs incurred in the cause and the reference; that the plaintiff should pay his own costs of the cause and of the reference, and should also pay to the defendant the costs of the defendant in the cause and reference; and that the said costs should be in the meantime taxed as between attorney and client; that the plaintiff should pay to the arbitrators for their use the sum of £25 for their fees and disbursements as arbitrators in the reference, and for the costs and expenses of the award.—*Warren* having obtained a rule to shew cause why the award should not be set aside, on the ground that it was uncertain whether the £50 was to go towards the costs of the plaintiff or of the defendant, or both; and that if the former, then it was inconsistent; and also on the ground that the arbitrators had exceeded their authority in directing the costs to be taxed as between attorney and client,

All matters in difference on the record in a cause were referred to arbitration, the costs of the action and of the reference and the award to be in the discretion of the arbitrator. The arbitrator awarded that the action should cease, and no further proceedings be taken therein; that the defendant should pay to the plaintiff £50 towards the costs of the cause and reference; that the plaintiff should pay his own and the defendant's costs of the cause and reference, the said costs to be taxed as between attorney and client; and that the plaintiff should pay the arbitrator £25 for his fees &c.:—*Held*, that this award was not uncertain or inconsistent; but that the arbitrator had exceeded his authority in awarding costs as between attorney and client; and that the order as to costs was so

Butt shewed cause.—The award is not uncertain; the £50 is to be paid to the plaintiff towards all the costs incurred in the cause and the reference on both sides, which he is ultimately to pay. And there is no inconsistency in it, in that view of the case, the arbitrators having full

connected with the rest of the award, that it could not be rejected as surplussage.

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power to award the costs as they should think fit. Secondly, the words respecting the taxation "as between attorney and client" may be rejected as surplusage, and the award construed as directing the costs to be taxed in the usual manner, as between party and party. But if that be not so, that part of the award may be waived, as was done in *Whitehead v. Firth* (a), where an arbitrator, having no authority to order costs, awarded them to be taxed as between attorney and client, but the plaintiff having waived his costs, and demanded only the principal sum awarded, was allowed to issue an attachment for the latter.

Warren, contrà.—The first part of the award is, substantially, the ordering of a stet processus. Then comes the award as to the costs, which is quite inconsistent and unintelligible; the plaintiff is ordered to pay the costs of the cause and the reference on both sides, and yet he is to receive £50 for costs.—Secondly, it is clear that the arbitrators had no authority to award costs as between attorney and client: *Watson on Awards*, 133, 134. [*Alderson*, B.—*Marder v. Cox* (b) is an authority to shew that that portion of the award may be rejected.] That case is distinguishable, as there the part relating to the mode of taxation was easily separable from the rest; but here the award of the costs as between attorney and client forms the very basis of the award, and is so intermingled with the other parts of the award that it cannot be separated.—He cited *Jackson v. Clarke* (c).

PARKE, B.—There is no difficulty as to the first objection. The inconsistency which at first sight appears is explained by the context, and it is clear that the arbitrators intended that the plaintiff should pay all the costs, both of the cause and the reference, together with the £25

(a) 12 East, 165.

(b) Cowper, 127.

(c) M'Clell. & Y. 200.

to the arbitrators; but as a partial indemnity for that, the defendant should pay him £50. But the other objection, I think, must prevail. The award of the costs as between attorney and client is so connected with the other parts of the award, that non constat that the payment of the £50 by the defendant was not part at least of the consideration for which the award as to the other matters was made. It appears to me to be so connected with the benefit which the defendant is to receive under the award, that it cannot be rejected.—The rule, therefore, for setting aside the award must be made absolute.

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ALDERSON B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

DOWLING v. HARMAN.

THIS was a rule calling upon the plaintiff to give security for costs, and was obtained upon an affidavit, stating that the deponent *believed* that the plaintiff was a Frenchman, and resided at Brussels. The affidavits in answer to the rule stated, that although the plaintiff was in the habit of frequently going abroad, and was abroad at the time of the commencement of the action, he was in this country at the time of the application, and intended to remain until after the trial. It appeared also that the defendant had obtained a Judge's order for time to plead on the usual terms.

An application to compel the plaintiff to give security for costs, on the ground of his residing out of the jurisdiction of the Court, may be made after an order has been obtained for time to plead on the usual terms.

But the Court will not grant such an application, where the plaintiff, though a foreigner and usually resident abroad, is at the time actually in this country.

Ball shewed cause.—The affidavit should have stated positively that the residence of the plaintiff is out of England;

the affidavit to ground such an application is sufficient, if it states that the deponent *believes* the plaintiff resides abroad.

Semble, that

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the statement of the mere belief of the deponent is insufficient. *Sandys v. Hobler* (a). [*Alderson*, B.—How can a man swear that positively, when he is himself here?] Secondly, the application was too late, after the defendant had obtained time to plead. The rule of H. T., 2 Will. 4, s. 89, which says that “an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined,” does not apply to the present case, where the defendant was under terms of taking short notice of trial. This is an extraordinary case, and the rule only applies to ordinary cases. The defendant cannot move for security for costs after he has obtained time, unless he shews that he did not know of the plaintiff’s residence abroad at the time he so obtained it. Thirdly, the plaintiff being actually in England, security for costs cannot be required from him, although his usual residence may be in a foreign country: *Anonymous* (b); *Ciragno v. Hossan* (c). It is not enough to say he is about to leave this country; he must be actually abroad.

Hoggins, in support of the rule.—The application was regular, being made before issue joined, according to the rule of H. T., 2 Will. 4. As to the other point, in the cases cited it did not appear that the plaintiff was a foreigner: here it is sworn that he is a foreigner, and that he resides at Brussels. Though the plaintiff be here at the time, security for costs may be ordered, provided the plaintiff is a foreigner, and is usually resident abroad.

PARKER, B.—We must, for the sake of regularity, abide by the rule of Court, which is, “that an application to compel the plaintiff to give security for costs, must, in ordinary cases, be made before issue joined.” The present

(a) 6 Dowl. P. C. 274.

(b) 8 Taunt. 737; 3 Moore, 78.

(c) 6 Taunt. 20.

case is an ordinary one; the circumstance of the defendant's being under terms to take short notice of trial, does not take it out of that rule. The rule was made to correct a diversity in the practice of the Courts on this subject, and with a view to introduce a uniformity in it. With respect to the other point, we must abide by the decision of the Court of Common Pleas in the anonymous case cited, which strongly resembles the present. It appears from the report of that case in Moore, that the plaintiff was a foreigner, usually resident at Dantzic, although he was at that time staying in this country. In the absence of any decision to the contrary, we must, for the sake of uniformity, adhere to the rule there laid down.

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ALDERSON, B.—The case of *Gurney v. Key* (a) is an authority in point to shew that the application is not too late.

Rule discharged—the costs to be
costs in the cause.

(a) 3 Dowl. P. C. 559.

WILLIAMS v. HIGGS.

IN this case *Halcomb* moved to bring back the venue from Cardiganshire to Merionethshire.

The affidavit on which he moved was made by the plaintiff's wife, he being himself unable from illness to attend to business.

PARKE, B.—We must adhere to the ordinary rule, which is that the affidavit should be made by some person acquainted with the nature and circumstances of the action. Unless there is an affidavit that the plaintiff is

An affidavit to bring back the venue, made by the plaintiff's wife, is insufficient, unless it appear that the husband was too ill to attend before a commissioner to make one, and that the wife is fully acquainted with the nature and particulars of the action.

The proper person to make the affidavit, under such circumstances, is the plaintiff's attorney.

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so ill that he cannot attend before a commissioner to make the necessary affidavit, and an affidavit of the wife, stating that she knows the nature and particulars of the cause of action, that rule cannot be dispensed with. The proper person, under the circumstances, to make the affidavit, was the plaintiff's attorney.

Motion refused.

KENNEY v. HUTCHINSON.

IN this case, the plaintiff having demurred to the defendant's plea, the defendant, on the day before that in which he ought to have joined in demurrer, took out a summons for time to join in demurrer, which was attended by both parties, and an order was made by *Gurney, B.*, allowing three days' time. The order was obtained from the Judge's clerk about five o'clock on the afternoon of Wednesday, the 22nd of January, but was not served until two o'clock on the following day. The plaintiff, however, on the opening of the office at eleven o'clock on that day, signed judgment.

A party obtaining a Judge's order ought to serve it "forthwith," i. e. before the opposite party can take the next step. And where a party, at 5 o'clock on the day before the time for joining in demurrer expired, obtained an order for three days' time to join in demurrer, which was not served until two o'clock on the following day, and the plaintiff had signed judgment at the opening of the office at 11 o'clock on the same morning:—*Held*, that the order had been served too late.

Cooking now moved to set that judgment aside for irregularity.—The question is, whether the defendant was bound to serve the order before nine o'clock the same evening on which it was obtained, or before eleven o'clock on the following morning. Both parties attended the Judge, and therefore the plaintiff's attorney knew of the order having been made. [*Parke, B.*—He cannot tell whether the defendant intends to draw up the order, until the defendant serves him.] There is no rule which requires the order to be served on the day it is made; and can the defendant's attorney be supposed to have waived

the order, by not serving it before eleven o'clock the following morning, when the plaintiff signed judgment? In *Charge v. Farhall (a)*, it is said that a Judge's order must be drawn up and served "forthwith;" but what does that mean? Does it mean within twenty-four hours, or at what time? The expression there seems to have been used in contradistinction to a delay of several days. [*Alderson, B.*—You knew when the opposite party could take the next step, and you ought to get it served before he could do so.]

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Barstow, who appeared to shew cause in the first instance, was stopped by the Court.

PARKE, B.—Although the attorney for the opposite party was present when the order was made, yet he could not know whether the party applying for it would draw it up or not. Then what is a reasonable time in which to make his election? When the parties live within a short distance of each other, there is ample time between five in the afternoon and nine at night, to serve an order of this description. But at all events, it ought to have been served before the opening of the office on the following morning, or rather before the plaintiff's clerk would have to leave his office, in order to reach the judgment office at its opening.

ALDERSON, B.—It is requisite that there should be some rigid rule in these matters. The inconvenience would be very great, if the parties were allowed time to consider whether they would avail themselves of a Judge's order and then, perhaps, ultimately abandon it.

Rule refused.

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Semble, that where a party adds the similiter, forming part of his own pleadings, it is a pleading within R. H. T., 4 Will. 4, s. 1, and must bear a date, or it may be set aside for irregularity. Such irregularity is not waived by the party to whom the issue so made up is delivered, omitting to take that objection, on attending a summons to shew cause why the action should not be tried before the sheriff.

THIS was an action of debt to recover a sum of money under £20. The defendant pleaded *nunquam indebitatus*, to which the plaintiff added a *similiter*, but without a date, and on the 13th of January delivered the issue so made up. On the following day, the 14th, the plaintiff's attorney took out a summons, calling on the defendant to shew cause why the action should not be tried before the sheriff, which summons the defendant's attorney attended, but took no objection to the issue on the ground of there being no date to the *similiter*. However, on the 15th, he took out a summons to shew cause before a Judge at chambers why the replication should not be set aside, on the ground of its being without a date: and it was afterwards set aside accordingly by an order of *Rolfe*, B.

Dowdeswell now moved for a rule to shew cause why that order should not be rescinded. First, the *similiter* is not a pleading within the meaning of the rule of H. T., 4 Will. 4, s. 1, which requires "every pleading, as well as the declaration, to be entitled of the day of the month and year when the same is pleaded." The *similiter* is only a form which serves to mark the acceptance of the issue when well tendered, and the mode of trial proposed; *Stephen on Pleading*, 2nd edit. 280: and in early times it was added in making up the record, and formed no part of the pleadings. It was decided in *Shackel v. Ranger* (a), that the rule did not apply to a *similiter* added by one party for the other. Here the plaintiff added his own *similiter*. [*Parke*, B.—That is the distinction. When a party adds his own *similiter*, it is a pleading, and ought to have a date; but where it is added by the opposite party,

(a) 3 M. & W. 409.

it need not. That distinction was taken by this Court in *Shackel v. Ranger*.] Secondly, the objection was waived, by the omission of the defendant to take it on attending the summons at the time the writ of trial was applied for. In *Mammatt v. Mathew (a)*, a request by the defendant that the plaintiff would accept certain persons as bail without opposition, was held to amount to a waiver of all irregularities in the affidavit of debt. The defendant's attorney, by attending the summons for the writ of trial, must be taken to have admitted that issue was regularly joined.

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PARKE, B.—The only question before the Judge, on the summons for the writ of trial, was whether any difficult question of law was likely to arise, which might render the trial before the sheriff improper. The defendant could not set aside the issue for any irregularity, on attending before the Judge to shew cause why the action should not be tried before the sheriff. The proper course was to obtain a summons to set it aside, which he did, and he was in time on the 15th. On a motion to compute principal and interest on a bill of exchange, you cannot shew for cause the irregularity of the judgment. So also, you cannot attack the regularity of the issue, on a summons like the present. The omission to do so, therefore, could not amount to a waiver. You may, if you think fit, take a rule on the first point.

Dowdeswell, finding the inclination of the Court against him, declined to take the rule.

(a) 4 M. & Scott, 356.

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DEBT for money lent, and on an account stated. Plea, *nunquam indebitatus*. At the trial before *Patteson, J.*, at the last Merionethshire Assizes, the facts appeared to be as follows.—The defendant, a gentleman residing near Portmadoc, in Merionethshire, was the owner of a coasting vessel called the *Progress*, which was generally employed in the conveyance of slates from Portmadoc to different places on the coast, and in bringing back return cargoes of any goods that might be required in that neighbourhood. In January, 1837, the vessel had taken out a cargo of slates, and on her return home was stranded in Bude Bay, in Cornwall. The defendant had an agent at Bude, from whom the master obtained a sum of £15, which was expended in victualling the vessel, and other necessary expenses. She proceeded on her voyage homeward, and put into Swansea harbour, where the master borrowed from the plaintiffs, (who were merchants at Swansea and Neath, and had contracted to ship on board the vessel a cargo of culm, consigned to a Mr. Williams, residing near Portmadoc), a sum of £5, which was applied as follows: 1*l.* 7*s.* for loading the vessel and getting out the ballast; £1 for a pilot; 13*s.* 6*d.* for a new chart and for the repair of the compass—the chart having been lost and the compass damaged when the vessel was stranded,—and the rest for provisions, and in payments to the broker for clearing out the vessel. These payments exhausted the whole of the £5, with the exception of 2*s.* 6*d.*, which the master paid over to the defendant on his arrival at Portmadoc. It appeared that the defendant had no agent at Neath or Swansea. Those places are about forty miles from Portmadoc, and a letter written there, and sent by post to the defendant, might have been answered in about four days. The master sailed for Port-

The master of a ship has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury.

madoc, with a fair wind, on the day after the advance of the £5. *Exch. of Pleas,*
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For the defendant, it was contended that the action was not maintainable, for that the master of a coasting vessel, in an English port, had no authority by law to borrow money on the credit of the owner. The learned Judge reserved this point. The defendant then adduced evidence to shew that in fact the credit was expressly given by the plaintiffs to Mr. Williams, the consignee of the cargo. The learned Judge left it to the jury to say, first, whether the supply of money by the plaintiffs was obtained by the master for the necessary use of the vessel; and secondly, whether it was advanced on the credit of the defendant or of Williams: and the jury found for the plaintiff, damages *£l. 17s. 6d.*, leave being reserved for the defendant to move to enter a nonsuit, if the Court should be of opinion that the action was not maintainable.

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In Michaelmas Term, *Jervis* obtained a rule nisi accordingly, against which, in this term,

Cresswell, Welsby, and Townsend shewed cause.—The jury having found that this money was borrowed by the master, and applied, for the necessary use of the vessel, in a port where the defendant had no agent, the plaintiffs are entitled by law to charge the owner with it. The rule of law on this subject is not limited to cases where the materials are supplied or money advanced to the master in a foreign port; it is founded upon the general control of the master over the vessel, which is necessarily vested in him for the safe and due prosecution of the voyage, and the preservation of the ship and crew. Here there was no deviation from the due and proper course of the voyage, and the master obtained the money for the purpose of carrying it into effect. [*Parke, B.*—The law is more strict as to the borrowing of money than as to repairs of the vessel.] The principle is the same, although in the former

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case a more pressing necessity may be necessary to be shewn, but that is a question for the determination of the jury. *Webster v. Seekamp* (a) is a distinct authority that the owner is liable for *necessary repairs* done to the ship in an English port, on the order of the master; and the Court assign a large meaning to the term "*necessary repairs*," viz. such as are reasonably fit and proper for the voyage, and such as a prudent owner himself would order if present. There, *Abbott, C. J.*, says, "The general rule is, that the master may bind his owners for necessary repairs done, or *supplies provided* for the ship." And *Bayley, J.*, "It is within the scope of his authority to order such repairs or supplies as it may reasonably be supposed that the owners, if they had had an opportunity of deciding for themselves, would have ordered." It may be said, that in the case of the advance of money, there is greater danger of its subsequent misapplication by the master; but that argument would as strongly apply to the case of an advance abroad. The master is not bound to hypothecate the ship or cargo. [*Parke, B.*—Is the application of the money to the purposes of the vessel anything more than strong evidence of the necessity? So, the subsequent misapplication would only be evidence that the master had not really borrowed the money for the purposes of the vessel.] It was formerly considered that a party supplying necessities to a ship, even without any hypothecation, had not only the personal security of the owners, but also the security of the specific ship: *Rich v. Coe* (b), *Farmer v. Davis* (c): and although that doctrine is now exploded, yet the rule as to the personal liability of the owner remains unaltered, and must equally apply to an advance in an English and a foreign port. It is laid down in *Abbott on Shipping* (d), (without anything to restrict the application of the rule to foreign ports), that "the business of fitting out, victualling, and

(a) 4 B. & Ald. 452.

(c) 7 T. R. 312.

(b) Cowp. 636.

(d) 6th edit. p. 116.

manning the ship, is left wholly to the management of the master in places where the owners do not reside, and have no established agent :” and that “his character and situation furnish presumptive evidence of authority from the owners to act for them in these cases.” *Robinson v. Lyall* (a) appears to be a direct authority in favour of the plaintiff. That was an action against a shipowner in London, to recover a sum of money furnished to the master at Portsmouth, on the return of the vessel from a foreign voyage, in order to pay seamen’s wages, and other debts contracted by the master at that place for necessaries for the use of the ship, some of which were contracted on the outward voyage. *Hobroyd, J.*, at the trial, nonsuited the plaintiff, on the ground that the master could not bind the owner, even for necessaries, in England ; but the Court set aside the nonsuit, holding the owner liable for all such money as had been advanced *necessarily* ; and directed the verdict to be entered for the plaintiff for such sum as should be awarded to be due for seamen’s wages, in respect of which alone a supply of money was necessary for the *then present* use of the vessel. Here, also, some of the payments made by the master must necessarily be made in ready money—for instance, the charge for a pilot, and the payments for clearing out the vessel. And it was more for the benefit of the owner that he should be the debtor of the plaintiffs for one single sum, than of many persons for different small amounts, for articles obtained on credit.—They cited also *Rocher v. Busher* (b), and *Palmer v. Gooch* (c).

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Jervis and Cowling, in support of the rule.—The master had no authority by law to pledge the credit of his owner for this money. The advance of *money* is very different from the supply of goods, or the doing of repairs to the ship. The master does not represent the owner to the

(a) 7 Price, 592.

(b) 2 Stark. Rep. 27.

(c) 2 Stark. Rep. 428.

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full extent of his authority, but only so far as is necessary for the prosecution of the voyage; and for that purpose, in an English port, it is not necessary that he should have authority to borrow money. Abroad, he can only borrow money where he can pledge the security of the ship. The owner cannot know that the money, when obtained, will be properly applied; in the case of repairs, the party who does them sees that they are necessary to be done. *Robinson v. Lyall*, which is the only case cited of an advance of money in an English port, is very shortly reported, and there is no statement of the judgment of the Court; but admitting its authority, it is distinguishable from the present case, because there the money, in respect of which only the verdict was ultimately entered, was advanced to pay seamen's wages, without the payment of which the ship could not leave the port, inasmuch as the crew would have a lien upon her for their wages. Suppose the owner of a vessel in England had an agent within two days' post of New York, could the master, even there, pledge the credit of the owner in England for money borrowed? [*Alderson, B.*—The master has no authority even to get credit for repairs, if the owner is at hand; but if money be indispensable for the prosecution of the voyage, where is the difference in principle between the two cases?] If the necessity be proved, the defendant is no doubt liable; but the argument is, that in an English port, where the master and the owner may readily communicate together, there *can be* no necessity for the borrowing of money, in order to proceed on the voyage; whereas abroad, from the nature of the case, that necessity does exist.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

Lord ABINGER, C. B.—In this case we are of opinion that the rule must be discharged. The point reserved by

the learned Judge was, whether the master of a coasting vessel could, by a contract made in England, bind his owner, who also resided in this kingdom, the contract being for a loan of money for the necessary use of the ship. Here the owner resided in North Wales; the contract was made in the county of Glamorgan.

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We think this was a question of fact, and was properly left to the jury by the learned Judge.

Under the general authority which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner, or his general agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary.

But if the vessel be in a foreign port, where the owner has no agent—or if in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner.

But then the further question arises, for what things he may pledge that credit? This also is limited, either to such things as are necessary, or (as Lord *Tenterden*, in his book on Shipping, page 116, and Mr. Justice *Story*, in his valuable book on Agency, section 122, very clearly lay it down) to such things as are reasonably fit and proper for the ship, or for the voyage, under the circumstances of the case.

But if repairs are needed, it is admitted he may pledge

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the owner's credit for them. But repairs are only instances of the above rule. If therefore money be necessary, it may be raised upon credit. In the case cited, of *Robinson v. Lyall*, this was done. There, without money the wages of the seamen could not be paid, and unless they were paid, the seamen might have refused to assist in the further navigation of the ship. The Court therefore held, that the master could pledge the owner's credit for money to that extent. So also, it may in some cases be necessary to pay harbour-dues, or pilotage, or the like, and to pay them in ready money; and if that be the case, and the prosecution of the voyage cannot take place till they are discharged, then also a necessity for having money in specie may arise; and if so, the master would be authorized, under this general power of doing all things necessary for the due prosecution of the voyage, to procure money by loan, and to bind the owner by a contract for that purpose. It is not doubted that in a foreign port, where the owner has no agent, this may be done: *Evans v. Williams* (a); Abbott on Shipping, page 117; and we think that all these questions are referable to one general principle, although, when it is applied to a case like the present, it will require stronger circumstances to establish the fact of the necessity, upon which the liability of the owner must depend.

In the present case, the learned Judge left the question to the jury, and they have found for the plaintiff. There was clearly evidence on which they might reasonably act; and as the verdict is under £20, we should not, even if we doubted as to the propriety of their conclusion, interfere to grant a new trial. The rule, therefore, must be discharged.

Rule discharged.

(a) 7 T. R. 481, n.

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MORSE v. APPERLEY.

THIS was an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded, 1st, not guilty; 2ndly, that the plaintiff was not possessed of the close in the declaration mentioned; 3rdly, that the defendant was seised in fee of the close in which, &c.; 4thly, that A. B. was seised in fee of the close in which, &c., and that the defendant as his servant, and by his command, committed the trespass complained of. The plaintiff had obtained a summons, calling on the defendant to shew cause before a Judge at chambers, why the third and fourth pleas should not be struck out, as being in contravention of the "General Rules and Regulations" of H. T., 4 Will. 4, s. 6. *Gurney*, B., before whom the summons was attended, refused to make any order, whereupon *Gray* applied to this Court for a rule to shew cause why the second plea, or the third and fourth pleas, should not be struck out, as being founded on "the same ground of answer or defence," within the meaning of the above rule.

W. H. Watson shewed cause.—The Court has no jurisdiction over the subject-matter of this application. If more than one plea is used, in violation of the rule of Court, the party is at liberty to apply to a Judge at chambers, but if he refuses to interfere, the rule gives no appeal to the Court. [*Alderson*, B.—My Brother *Gurney* having refused to make any order, I do not see how this Court can interfere. When a Judge makes an erroneous order, then you may appeal to the Court; but here he makes no order. The Court has not the same power in this respect as the Judge has; for example, if parties come before me at chambers upon an application like the present, and in answer to my inquiry whether the defendant intends to make two separate

In trespass qu. cl. fr., the defendant pleaded, 1st, not guilty; 2ndly, that the plaintiff was not possessed; 3rdly, that defendant was seised in fee; 4thly, that A. B. was seised in fee, and that the defendant, by his command, committed the trespass complained of, &c. A summons having been taken out to strike out the 3rd and 4th pleas, the Judge refused to make any order, whereupon an application for that purpose was made to this Court:—*Held*, that the 3rd and 4th pleas might be pleaded together with the 2nd, as they were not necessarily founded on the same ground of answer or defence, within R. G. H. T., 4 Will. 4, s. 6. *Quære*, whether such an appeal lies to the Court, where the Judge at chambers has refused to make any order.

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defences under the proposed pleas, he satisfies me that he does so intend, I make an indorsement upon the summons accordingly. The Court, however, has no power to make such indorsement, which shews that there cannot be an original application to the Court. In a case like the present, where the point could not be raised except an order be made, the party might apply to another Judge; but if each Judge individually refuses to make an order, an appeal to them collectively in this Court can surely be of no avail.] But these pleas are no infringement of the rule. It was never intended by the new rules, that a party should not be at liberty to deny the fact of possession, and also to set up title in himself. The second plea is a mere denial of possession, which constitutes a sufficient title to maintain the action, as against a wrong-doer. By the third and fourth pleas, the defendant shews title in himself and A. B., under whom he justifies. Those pleas admit the plaintiff's possession, but deny his right and title to the close. The plaintiff might reply to the third plea, that he was tenant to the defendant from year to year; to which the defendant might rejoin, that the tenancy was determined by notice to quit. The new rules were never intended to preclude a party from bringing the question to a precise issue, but the contrary. (He was then stopped by the Court).

Gray, contra.—First, as to the question of jurisdiction. There are two classes of cases to which the rule of Court extends. The first is, where it cannot be seen on the face of the pleadings themselves whether the contract or matter alleged in the two counts or pleas is the same; as, for instance, where a declaration contains two counts, each stating a contract to build a house, a Judge cannot tell from the declaration itself, whether there were in point of fact separate contracts as to different houses; he must, therefore, inquire of the plaintiff whether he means to give evi-

dence of separate contracts under each count. The second class is, where it appears on the face of the pleadings themselves that the matter alleged in one pleading may be given in evidence under another,—as in *Neale v. M'Kenzie* (a), where a justification for entering the house as landlord, to distrain for rent, was not allowed with the general issue, because, by statute, that matter might be given in evidence under the general issue: in such cases a Judge requires no information beyond what appears on the face of the pleadings, to enable him to come to a decision. In the former case an indorsement on the summons becomes necessary, upon the assertion of the party that he intends to give separate matters in evidence, and perhaps that may be a reason why, in such case, no appeal would lie to the Court; but in the latter case every thing depends upon what appears on the pleadings themselves, and no indorsement on the summons can become necessary; because there is no assertion of the party, the truth or falsehood of which is to be afterwards ascertained and acted on by the Judge at the trial, as there is in the other case. The present case is within the second class, and therefore there can be no objection, on general principles, to an appeal to the Court. Then, secondly, these pleas are in contravention of the rule. A declaration in trespass *quare clausum fregit* alleges two traversable facts: first, that the defendant broke and entered a certain close; 2ndly, that the close was the plaintiff's. Now, the latter allegation is an allegation of title, *Purnell v. Young* (b), and not of bare possession; and although, where it is traversed, the plaintiff will prove the issue by shewing mere possession, if the defendant be a wrong-doer, that is because possession is *prima facie* evidence of title, and a wrong-doer is, from rules of convenience, precluded from raising the question whether the plaintiff or a stranger has title. The

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(a) 1 C., M., & R. 61.

(b) 3 M. & W. 288.

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reasons why he is so precluded are forcibly stated in the judgments of Lord *Ellenborough*, *Le Blanc*, J., and *Bayley*, J., in *Chambers v. Donaldson* (2). If then, in point of pleading, that be an allegation of title, the form of the traverse can make no difference; the plea concludes to the country, and must be taken to be a denial of the plaintiff's title. The first and second pleas in this case put in issue what the general issue did before the new rules, that is, both the facts before alluded to; and under the general issue, before the new rules, the defendant could give in evidence either *liberum tenementum* in himself or in another, and that he acted by command of the other: *Argent v. Durrant* (b). In the latter case Lord *Kenyon* says: "It is now too late to discuss this question, which appears to be settled in Lord *Coke's* time. In a case in 1 Lev. 301, in trespass, the defendant pleaded not guilty; and if he could give in evidence, that at the time of the trespass the freehold was in such a one, and he as his servant, and by his command, entered, was the question; and it is said by *Coke* 'that the same might be so well enough; and so it was adjudged in *Trevilian's case*, for if he by whose command he entereth hath right at the same instant that the defendant entered, the right is in the other, by reason whereof he is not guilty as to the plaintiff; and judgment was given accordingly.' Conformably to this doctrine, I have always understood that it has been the practice to permit the defendant to give *liberum tenementum* in evidence under the general issue." In *Carr v. Fletcher* (c), the same doctrine was acted upon. [Lord *Abinger*, C. B.—That was no decision of the Court, but an admission on the part of the counsel that this defence might be given in evidence under the general issue. *Alderson*, B.—It is laid down in *Chambers v. Donaldson*, that if the defendant plead soil and freehold in another, by whose command he justifies, such command may

(a) 11 East, 66.

(b) 8 T. R. 403.

(c) 2 Stark. 71.

be traversed by the plaintiff. The general issue would put in issue not only the soil and freehold being in a stranger, but that by his command the defendant entered.] The reason why it may be given in evidence is stated in Gilbert on Evidence, 230, because it falsifies the declaration. He says, "The defendant may prevail in this issue, first, by making title to the land, for then he falsifies the declaration, for he proves that he did not enter into the plaintiff's close, but his own, and, consequently, that is a very just disproving of the plaintiff's declaration." If, then, the second plea amounts in substance to a traverse of the close being the plaintiff's, the facts alleged in the third and fourth pleas will, if true, prove it, and may be given in evidence under it; and therefore, either that plea, or the third and fourth, ought to be struck out as being prohibited by the new rules.

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PER CURIAM.—We think these pleas are not necessarily in contravention of the rule. The plea of *liberum tenementum* admits the plaintiff to have the actual possession, but alleges that the right of possession is in the defendant as owner of the fee. It is consistent with that plea that the plaintiff may be in possession under a lease from the owner of the fee. It is possible that these pleas may apply to a state of facts constituting one and the same subject-matter of defence, but it is also possible that they may apply to a totally different state of facts, constituting a different defence; and if that be so, they do not come within the rule which has been cited.

Rule discharged with costs.

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ALDERTON v. ST. AUBYN.

Where a writ of sequestration was returned to this Court before the plaintiff's execution was satisfied, the Court allowed it to be taken off the file and sent back to the Bishop, in order that he might take the return off the writ and certify to the Court what he had done under it. The rule for that purpose is absolute in the first instance.

IN this case a writ of sequestration, at the suit of the plaintiff, having been issued, directed to the Bishop of Exeter, was indorsed and returned by him into this Court before the execution was fully satisfied.

Hunfrey now moved for a rule to shew cause why the writ should not be taken off the file of the Court and sent back to the Bishop, on the ground that this, being a continuing writ, ought not to have been returned until the execution was satisfied, otherwise parties who had lodged writs of sequestration subsequently, would deprive the plaintiff of the fruits of his prior execution. In *Disney v. Eyre (a)*, the Court, under similar circumstances, directed the writ to be taken off the file and returned to the Bishop, in order that he might certify what he had done under it. He prayed that the rule might be absolute in the first instance.

PARKER, B.—I think this rule ought to be granted, and that it ought to be absolute in the first instance. If we were to grant a rule nisi only, there might be a difficulty as to the parties upon whom the plaintiff was bound to serve it; the only parties who could properly lay any claim to service would be those who had issued subsequent writs, and who may be termed mesne incumbrancers. The Bishop was wrong in returning the writ when he did, but for that the plaintiff ought not to suffer. The Bishop may take the return off the writ, and certify to the Court what he has done under the writ.

The rest of the Court concurred.

Rule absolute.

(a) 1 Alc. & Nap. 34.

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1840.*

BLAKE v. WARREN.

IN this case, notice of taxation had been given by the plaintiff's attorney for Saturday, the 23rd of November. The taxation not being completed on that day, notice of continuance was served for twelve o'clock on the following Monday, at Westminster. Before eleven o'clock on that morning, the defendant's attorney sent a notice that he objected to the taxation being proceeded with at Westminster. He accordingly did not appear at the time appointed, and the Master proceeded with the taxation *ex parte*, and execution subsequently issued.

A notice to attend taxation at Westminster, during term, is good.

Erle now moved for a rule to shew cause why the execution and all subsequent proceedings should not be set aside, and why the Master should not review his taxation. He contended that the taxation was irregular, because all taxations ought regularly to take place in the Master's office; and although, by consent of the parties, the taxation might be made at Westminster, the defendant's attorney was not bound to attend there, and having objected to do so, the taxation ought not to have been proceeded with.

LORD ABINGER, C. B.—Whilst the Court is sitting, the Masters are properly here, and the practice is to attend them here.

ALDERSON, B.—The objection might be a good one for the Master to make; but I cannot see how it can be an objection by the attorney. It is only for the convenience of suitors that the Masters attend at the office at all in Term time.

Rule refused.

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SEMPLE v. TURNER.

A writ of error coram vobis is not a supersedeas in itself, but it prevents the party who has obtained judgment from taking out execution, except by leave of the Court or a Judge.

A WRIT of error coram vobis had been sued out in this case by the defendant, of which notice had been served upon the plaintiff. The latter, however, having obtained a Judge's order for leave to issue execution, sued out a ca. sa., under which the defendant was taken in execution.

Mellor now moved for a rule to shew cause why the writ of ca. sa. should not be set aside, and all subsequent proceedings stayed. He relied upon *Levy v. Price* (a), as an authority that a writ of error coram vobis is a supersedeas of execution from the time of notice given that it has been sued out, and not from the time of the allowance of it only.

PARKE, B.—The present case differs from *Levy v. Price* in this respect;—that there the plaintiff, after notice of the writ of error, sued out execution without the leave of the Court, which was accordingly held to be irregular. In this case leave had been obtained for that purpose. A writ of this kind is a stay of proceedings or not, as the Court shall direct.

ALDERSON, B.—A writ of error coram vobis is not a supersedeas at all; and the Court has only engrafted upon it the necessity for obtaining leave to issue execution, because it would be unseemly to allow the plaintiff to have power of himself to issue execution after such a writ had been sued out, and consequently while a question is depending, by the decision of which his right of action may be destroyed altogether. That is stated by Lord *Ellenborough*, in *Birch v. Triste* (b), as the principle on which the practice pro-

(a) 2 M. & W. 533.

(b) 8 East, 415.

ceeds; and the case of *Walker v. Stokoe* (a), which he there cites, is an authority that a writ of error coram vobis is not a supersedeas in itself.

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Rule refused.

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(a) Carthew, 367.

DAVIES v. EVAN HUMPHREYS.

INDEBITATUS assumpsit for money paid, and on an account stated. Pleas, 1st, non assumpsit; 2nd, the Statute of Limitations.

At the trial before *Coleridge, J.*, at the Carmarthen-shire Spring Assizes, 1839, the following appeared to be the circumstances upon which the action was founded:— Shortly before the making of the promissory note hereinafter mentioned, that is to say, about the month of November, 1827, the daughter of the plaintiff married the defendant, who was the son of one John Humphreys, the defendant in the action next mentioned, and which John Humphreys was then the tenant and lessee of a farm called Coed, in the same county. The plaintiff gave his daughter on her marriage £100 and some household furniture, and John Humphreys, on the same occasion, gave up to the defendant, his son, the lease of Coed, together with the stock and implements, (which were valued at £1150), on the understanding that the defendant should pay him for

By a promissory note, E. H., W. D., & J. H., jointly and severally promised to pay to J. E. £300, with interest. W. D. having afterwards paid J. E. £280 on account of the note, J. E. made the following indorsement upon it:—"Received of W. D. the sum of £280, on account of the within note, the £300 having been originally advanced to E. H." In an action brought by W. D., who had paid the whole amount due, against J. H.,

to recover contribution from him "as a co-surety."—*Held*, that the indorsement was admissible in evidence, to prove not only the payment of the £280, but also that the money was originally advanced to E. H. as principal.

The amount of principal and interest was paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was paid by him within that period. The Statute of Limitations having been pleaded:—*Held*, that the plaintiff was entitled to recover only to the extent of £30 which had been paid within the six years, and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion.

Held, also, in an action on the same note against E. H., the principal, that the Statute of Limitations was a bar to all except £30, as the plaintiff had a right of action against the principal the moment he paid anything, for so much money paid to his use.

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the same the sum of £800, (being £350 less than the actual value), in the following manner: viz., by paying down the sum of £400, and giving his undertaking for the other £400. The defendant handed over to his father the £100 which he received with his wife, and they both (Evan and John Humphreys) applied to the plaintiff to make up the other £300, which were to be paid down as above mentioned. This the plaintiff declined doing; but agreed, that on the lease of Coed being deposited with him as a security, and on their procuring the money from a relative of theirs, one John Evans of Altycadno, he would join with them as their surety in a promissory note for the amount. On the 27th of December next after the marriage, the plaintiff, the defendant, and John Humphreys met, when one Thomas Jones, an attorney, being sent for, he drew up a promissory note, which was signed by them and witnessed by him; but he died before the trial. The following is a copy of the note and indorsements:—

“ £300.”

“ On demand we do hereby jointly and severally promise to pay to Mr. John Evans, of Altycadno, or order, the sum of three hundred pounds, with lawful interest for the same. Value received. As witness our hands this 27th day of December, 1827.

(Signed)

EVAN HUMPHREYS,

Witness,

Of Coed, Llandifilog.

THOMAS JONES,

W. DAVIES, Marnage.

Attorney, Caermarthen.

JOHN HUMPHREYS.”

Indorsed.

“ The principal money or sum of three hundred pounds is not to be called in, or recovered, or paid up, unless six months' previous notice is given of the intention of so doing in writing.

“ Received one year's interest, paid to the 27th of December, 1829.”

" 1831, December 31.—Received of Mr. William Davies the sum of two hundred and eighty pounds, on account of the within note, *the £300 having been originally advanced to Mr. Evan Humphreys.*

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Witness,

JOHN EVANS.

THOMAS JONES.

" June 5, 1832—Received on account of this note £20.

JOHN EVANS.

" Received 11th of July, 1832, of Mr. William Davies, 8l. 10s. of account of note and interest, which I hold of him.

JOHN EVANS.

" Received also, this 29th of August, 1832, 10l. 10s.

Altycadno.

JOHN EVANS.

" January 12th, 1833.—Received this day of Mr. William Davies, the sum of £11, which, with the sum of £— before paid by him to me, is the balance of principal and interest on this note.

Witness,

JOHN EVANS.

LEWIS MORRIS, Attorney, Caermarthen."

No evidence was given of the payee's applying to the defendant or to John Humphreys for payment, but it was proved that he applied to the plaintiff, and that the plaintiff made the payments, the receipts for which were indorsed on the note, on the respective days stated in those receipts. It also appeared that those receipts respectively were signed by the payee, and that he died before the trial.

The amount of principal and interest due on the note was paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was paid within that period.

Two grounds of defence were relied upon at the trial:—
1st, that the respective payments were made by the plaintiff as a gift to his son-in-law, and not as a loan; and,

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2ndly, that the Statute of Limitations was a bar to all except the £30. The learned Judge left it to the jury to say whether the transaction was a gift or a loan; and told them that, in his opinion, the statute barred all but the sum paid within the six years; but should they be of opinion that it was a loan, he would reserve leave to the plaintiff to move to increase the damages from £30 to £300, in case this Court should be of opinion that he was wrong in point of law. The jury found for the plaintiff, damages £30. In Easter Term, 1839, *Chilton* obtained a rule pursuant to the leave reserved.

In the action by the same plaintiff against John Humphreys, which was also an action of indebitatus assumpsit for money paid, and on an account stated, the pleas were the same as in the other action, viz. non assumpsit, and the Statute of Limitations. In this action, however, the plaintiff, by his particulars of demand, stated that he brought his action to recover £165, being the half of £330, which he was obliged to pay as principal and interest due on a promissory note for £300, dated the 27th of December, 1827, and made by the plaintiff and defendant and one Evan Humphreys, but *signed by the plaintiff and the defendant as sureties for the said Evan Humphreys*; and towards the payment of which said sum of £330, so paid by the plaintiff, the defendant, as such co-surety, was liable to contribute one moiety.

On the trial of this cause, at the same assizes, the facts of the case appeared to be the same as those detailed in the preceding case against Evan Humphreys, except that Evan Humphreys was himself called as a witness for the now defendant, and stated that the money was borrowed of Evans, of Alt-y-Cadno, at the plaintiff's request, for his daughter, and to enable the witness (her husband) to pay his father for the stock of the farm left at Coed. It was objected, on the part of the defendant, that there was no evidence to shew that the plaintiff signed the note as co-

surety with the defendant, as stated in the particulars of demand, except the indorsement on the note that the money was originally advanced to Evan Humphreys, and that that indorsement was inadmissible for that purpose. The learned Judge overruled the objection, but gave the defendant leave to move to enter a nonsuit, should the Court above be of a different opinion. The questions left by him to the jury were: 1st, Were the plaintiff and defendant co-sureties with Evan Humphreys, or was the plaintiff a principal? and, 2ndly, Was the money advanced by the plaintiff as a gift, or advanced on his credit by way of loan? and he told them that he thought the Statute of Limitations precluded the plaintiff from recovering more than £15, a moiety of the sum paid by him within the six years next before the commencement of the action. In answer to the first question, the jury said that they thought the plaintiff and defendant were co-sureties; and to the second, that the money was advanced as a loan only; and their verdict was accordingly taken for the plaintiff, damages £15; the learned Judge giving the plaintiff leave to increase the verdict, either to £30 or £150, if the Court above should be of opinion that he was entitled to recover either of those sums.

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In Easter Term last, *E. V. Williams*, and *Chilton*, obtained cross rules, the former for a nonsuit, and the latter to increase the damages to £30 or £150.

In Trinity Term, cause was shewn against the rule for a nonsuit by

Chilton and *Evans*, for the plaintiff.—There was evidence to go to the jury that the plaintiff and the defendant John Humphreys were co-sureties. The indorsement, which was put in and was not objected to, was evidence of the fact therein stated, that is to say, of “the £300 having been originally advanced to Mr. Evan Humphreys.” It will be said on the other side, that

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although that indorsement was evidence of the payment of the £280, yet it was not evidence to shew to whom the £300 was originally advanced: but the cases shew that where an entry of this sort is admissible at all, it is admissible for all purposes, to prove the facts stated in such entry: 1 Phillips on Evidence, last edit., 349. By this indorsement, the party acknowledges payment of the sum of £280, and says "it is Evan Humphreys to whom I lent the money;" that is a fact peculiarly within his knowledge, made by a person having no interest to misrepresent, and being a declaration against his interest, is therefore admissible in evidence after his death. If he had given time to Evan Humphreys after that, he would have lost his remedy against the two others. In *Gleadow v. Atkin* (a), it was held that an indorsement upon a bond in the handwriting of the obligee, which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for a third person, was admissible in evidence to connect the payments of interest with the bond, the bond being upwards of twenty years old, but the payments having been made within twenty years by the obligor to the third person. So, in *Higham v. Ridgway* (b), it was held that an entry made by an accoucheur in his book, of his having delivered a woman of a child on a certain day, the charge for which was marked "paid," was admissible evidence of the birth of the child on that day, on the trial of an issue as to his age, at the time of his afterwards suffering a recovery. These decisions are on the principle, that the entry being against the interest of the writer in one respect, it stamps the whole with validity. If this were not so, the entry in the case of *Higham v. Ridgway* would have been merely proof of the money hav-

(a) 1 Cr. & M. 410.

(b) 10 East, 120.

ing been paid; but it was held admissible to prove the age of the child. It was there a perfect matter of indifference to the accoucheur on what day the child was born. The mere fact of payment was not the object of the inquiry. [Alderson, B.—It appears once to have been doubted, whether the entry must not have been made by a person who, if alive, could have been examined as a witness at the trial.] That does not appear to have been necessary, from what is said by Bayley, B., in *Gleadow v. Atkin*, as to the note he had made of *Roe v. Rawlings (a)*, and *Higham v. Ridgway*. He says—"My entry of the case of *Roe v. Rawlings*, in my own note-book, was, that the declaration of a person who has peculiarly the means of knowing a fact, and has no interest in mistaking it, is admissible after his death to prove that fact, and à fortiori it would be admissible if the fact were against his interest." And after stating his entry of the case of *Higham v. Ridgway*, he adds, "There is not one single syllable in that entry as to the qualification that he could be examined in his lifetime." It appears, indeed, to have been doubted whether the ingredient of the entry being against the interest of the party making it, was necessary in order to render it admissible. In *Phill. on Evidence*, 8th edit., 808, it is said, "in some cases the Courts appear to have considered declarations to be admissible, without proof that the party making them had any actually existing interest which could be lessened or endangered;" and *Barker v. Ray (b)* is referred to, where the cases are collected. In *Doe v. Robson (c)*, entries of charges made by an attorney in his books, shewing the time when a lease prepared for a client of his was executed, which charges were shewn to have been paid, were held to be evidence, after the attorney's death, that the lease was prepared subsequently to the time it bore date. Lord *Ellenborough* puts it upon the

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(a) 7 East, 279.

(b) 2 Russ. 67, n.

(c) 15 East, 32.

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ground of there being "a total absence of interest in the party making the entries to pervert the fact, and, at the same time, a competency to know it."

E. V. Williams and Nicholl, contra.—Although the indorsement on the note was good evidence of the payment of the £280, it was not evidence to shew for whom the money was originally advanced. Where an entry naturally states that which is necessary and germane to the purpose for which the entry is made, by a party charging himself with the receipt of money, the whole may be admissible in evidence; but this is not so. It is the statement of an entirely independent matter, not at all connected with the other fact before stated, namely, the payment of the £280. This, in several respects, does not come within the rules as to the admissibility of entries of this nature. The lender has not necessarily any peculiar means of knowledge for whom the money was advanced, though the borrower has. Neither was it necessarily against his interest, as he might have thought Evan Humphreys was a more substantial and responsible person. [*Maule, B.*—He had a right to treat them all as principals, but he chooses to say, I have that right against one only.] At all events, it is not clear that it was against his interest, and, if so, it is not admissible: *Chambers v. Bernasconi* (a). In that case a sheriff's officer sent a written memorandum to the sheriff's office, stating that he had arrested A. B. at a certain place, which return was filed at the sheriff's office, and, the officer being dead, was received in evidence to prove the place of the arrest, in an action between A. B. and a third party; but this Court granted a new trial, intimating a strong opinion that such return was not evidence of the place of the arrest. *Bayley, J.*, there says, "The principle acted upon in the cases of *Doe v. Robson*,

(a) 1 Cr. & J. 451.

Higham v. Ridgway, and *Middleton v. Melton* (a), was, that it was against the interest of the party to make the statement at the time of making it." The cause was afterwards tried again, when Lord *Lyndhurst* refused to receive the evidence, and a writ of error having been brought on a bill of exceptions, it was decided by the Court of Exchequer Chamber (b), that the memorandum was not admissible to prove the place of arrest, on the ground that, "whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." In the case of *Ruttl v. Wright* (c), it was said by Lord *Lyndhurst* (d), "that it did not follow, because a document is received in evidence, in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received." That applies to the present case; for the statement of the party as to whom the £300 was originally advanced, is totally collateral and independent of the former part of the entry, and has no connexion with the statement of the payment of the £280, and is in no respect a necessary part of such entry. It therefore was not evidence of the fact so stated.

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Cur. adv. vult.

In the Vacation Sittings after Trinity Term, cause was shewn against the rule to increase the damages in both actions, by

E. V. Williams and *Nicholl*, for the defendant.—The

(a) 10 B. & C. 317.

(b) 1 C., M., & R. 347.

(c) 1 Phill. on Evidence, 8th
edit., 328.

(d) *Id.* 368.

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plaintiff is not entitled to recover any money which has not been advanced by him within six years previous to the commencement of the action. First, as to the action against the co-surety. As soon as a co-surety is compelled to pay any part of the debt, an action on an implied assumpsit arises to him, to recover from his co-surety contribution to the amount of one-half of the money he has so been compelled to pay; and if that right be not enforced within six years, it will be barred by the Statute of Limitations. The case of *Craythorne v. Swinburne* (a) is a leading authority on the subject of contribution. There Lord *Eldon* says, "It has been long settled, that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution; and I think that right is properly enough stated, as depending rather upon a principle of equity than upon contract; unless in this sense, that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons; and it must be upon such a ground of implied assumpsit, that in modern times Courts of law have assumed a jurisdiction upon this subject, a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous, especially since it has been held, that separate actions may be brought against the different sureties for their respective quotas and proportions:" referring to *Cowell v. Edwards* (b), where it was so held by the Court of Common Pleas, of which Lord *Eldon* was at the time Chief Justice. The same point had also been determined in *Deering v. The Earl of Winchelsea* (c), which was cited in *Cowell v. Edwards*.

(a) 14 Ves. 164.

(b) 2 Bos. & Pull. 268.

(c) *Id.* 270.

Perhaps *Slade's case* (a) may be cited, to shew that an action of debt cannot be maintained on a contract to pay money by instalments on different days, before the last day has expired—which was confirmed by *Rudder v. Price* (b); but that only applies to an action of *debt*, and the case of *Cooke v. Whorwood* (c) shews that that doctrine does not extend to an action of *assumpsit*. As soon as the co-surety pays any part of the debt, an implied *assumpsit* arises, and the co-surety may bring his action to recover a moiety of the sum so paid. [*Parke, B.*—Do you say that a co-surety could sue before he has paid more than his own moiety?] Yes; the proposition of Lord *Eldon* in *Craythorne v. Swinburne* is, that if the creditor calls upon either of them to pay the principal debt, or *any part* of it, the surety has a right to call upon his co-surety for contribution. He enters into a contract to pay his moiety of any sum that the other shall be called upon to pay, and if he does not do so he breaks his contract. The principle is not that the surety is to wait until he has paid the whole, or at least more than his own moiety, but that he may sue as soon as he pays anything. Suppose a co-surety to pay all but a small fraction, and become bankrupt, or die insolvent; could not his assignees or executors bring an action for the recovery of a contribution in respect of what he had paid before his bankruptcy or death? Secondly, with respect to the action against the principal, it is perfectly clear that as soon as the surety pays any part of the debt, a right of action upon an implied *assumpsit* arises to him, to recover the amount he has been so called upon to pay. As soon as the plaintiff paid any money on account of the principal, a cause of action arose. Then, if so, the Statute of Limitations is a bar to all that was paid beyond the six years.—*Rothery v. Munnings* (d) was also cited to shew that the payments within the six years did not take the rest out of the statute.

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(a) 4 Rep. 94 b.

(c) 1 H. Bl. 547.

(b) 2 Saund. 337.

(d) 1 B. & Ad. 15.

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Chilton and Evans, contra.—The observations of Lord Eldon, which have been cited, are only a dictum, not applicable to any difficulty in the case then before him; nor, in using the expression "*any part* of the debt," did he contemplate the case where less than one half had been paid by the co-surety. The plaintiff had no right to bring an action until the whole amount was paid, and at all events he was not bound to do so. The right of action in respect of each payment is kept alive as long as the instrument or security, in respect of which it is paid, is kept alive. As long as the note itself is kept alive, the various liabilities that arise upon it are kept alive also. It is admitted on the other side that an action of *debt* could not be maintained until the whole sum were paid, and there is no reason why a different rule should prevail in *assumpsit*. A Court of law must look at the true meaning and intention of the contract, and it can never be assumed, that the surety intended to make himself liable to an action on the payment of every £5 towards satisfaction of the debt. The plaintiff was not bound to bring his action until he had paid the whole amount, and was enabled to produce the security given for it. The payment by the surety must be taken to have been by compulsion of law, and he was not by law compellable to pay less than the whole amount, as no action could be maintained on the note for less than the full amount. The Statute of Limitations was therefore no bar, and the plaintiff was entitled to recover to the full amount in the one action, and a moiety in the other. With respect to the £30, which was paid within the six years, the whole of that was clearly paid for the co-surety, as the plaintiff had paid much more than his share before.

In Michaelmas Term the judgment of the Court was delivered by—

PARKE, B. —In these cases actions were brought by the plaintiff, one of the makers of a joint and several promis-

sory note, dated the 27th of December, 1827, for the sum of £300, with interest, to recover from the two other makers, Evan Humphreys and John Humphreys, a part of the money paid by him to the payee, he having paid the whole. In the action against Evan Humphreys, the plaintiff claimed the whole, alleging that the defendant was the principal debtor. Against the defendant John Humphreys, he claimed a moiety of what he had paid, alleging that the defendant was a co-surety. There were two pleas,—non assumpsit, and the Statute of Limitations; and on the trial at the Spring Assizes, before my Brother *Coleridge*, it appeared that the plaintiff had paid the whole of the debt and interest, of which the sum of £30 only was paid within six years before the commencement of the suit, the residue having been discharged before. For this sum the plaintiff recovered against Evan Humphreys, leave being reserved by the learned Judge to move to increase the amount to the whole sum paid; against John Humphreys, the plaintiff recovered a moiety of £30, and permission was also given to move to increase that verdict.

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In the latter action, an objection was taken on the trial, that the plaintiff was confined, by the particulars of his demand, to a claim against the defendant as co-surety, and that on the evidence there was no proof of his being a co-surety. To obviate this objection the plaintiff relied on a receipt, indorsed on the back of the note by the payee (since deceased), acknowledging the payment by the plaintiff of £280, on account of the £300, "the £300 having originally been advanced to Evan Humphreys."

It was objected, that this receipt was inadmissible for the purpose of shewing that the money was so advanced; but the learned Judge received it, reserving liberty to move to enter a nonsuit. Rules were granted on both sides. These several points were discussed at the sittings after last term, before my Brothers *Alderson*, *Gurney*, *Maule*, and myself, and time was taken by the Court to consider them. It will be most convenient first to dispose

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of the last question. That the receipt was evidence of the fact of the payment which it admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to shew that the £300 was advanced to Evan Humphreys: and certainly if this point were now, for the first time, to be decided, it would seem more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which it had been made, and that it would have the same effect only that proof by parol of like payment would have had. In the case of stewards' books, the receipts of money, as rent, would be equivalent to the proof of payment of money as rent, and establish the title of the person receiving it, and the like. But the authorities have gone beyond that limit, and the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it; as in the case of *Higham v. Ridgway* (a), where the memorandum of the payment of the midwife's charge for attending a birth was held to be evidence of the date of the birth; and *Doe v. Robson* (b), where the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn, which the proof by an eye-witness of the same payment, on account of such charges, would not have been; and there are other cases to the same effect. Without overruling these cases, (and we do not feel ourselves authorized to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that £280 was paid by the plaintiff to the payee, as for a debt due from Evan Humphreys as principal, but also of the fact that the debt was due from Evan

(a) 10 East, 109.

(b) 15 East, 32.

Humphreys to him. The *effect* of the evidence was for the jury, to whom the question was properly left on this and the parol testimony in the cause, whether he was the principal debtor or not; and no fault is found with their verdict. The rule, therefore, for a nonsuit must be discharged. On the other hand, the rule for increasing the amount of the verdict against Evan Humphreys, the principal, must also be discharged; for it is clear that each sum the plaintiff, the surety, paid, was paid in case of the principal, and ought to have been paid in the first instance by him, and that the plaintiff had a right of action against him the instant he paid it, for so much money paid to his use. However convenient it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement. The consequence is, that the plaintiff's right of action against the principal must be limited to the full amount of all the payments within six years, and this being the amount for which the verdict was taken, the rule to enter a verdict for a larger sum must be discharged. Against the co-surety the case is different—the Court will give it further consideration.

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And now, in this Term, the judgment of the Court, on the remaining point in the action against John Humphreys, the surety, was delivered by

PARKE, B.—This was an action by the plaintiff against the defendant, his co-surety on a promissory note, dated the 27th of October, 1827, for the sum of £300, with interest, to recover a moiety of the whole amount which he had paid to the payee. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued in the Sittings after Trinity Term. In the course of the last Term,

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the Court disposed of the rule in the latter action, and one of the questions in this; having reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of *Cowell v. Edwards* (a), and *Craythorne v. Swinburne* (b); though Lord Eldon has, and not without reason, intimated some regret that the Courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favour of the second of these propositions. Lord Eldon, in the case of *Ex parte Gifford* (a), states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others, *that if one pays more than his proportion*, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay: and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable: for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who

(a) 2 B. & P. 269.

(b) 14 Ves. 164.

(c) 6 Ves. 805.

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might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a ratable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits; indeed, convenience seems to require that Courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what

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the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

Rules accordingly.

WILLIAMS and Another, Assignees of WILLIAM BEVAN, &
Bankrupt, v. WILLIAMS.

In an action brought by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt, who has not obtained his certificate, (but has released his assignees), is not a competent witness to prove the payment of a sum of money to the defendant by the bankrupt after his bankruptcy.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs, as assignees, since the bankruptcy. Plea, non assumpsit.

The cause was tried before the under-sheriff of Brecon, when it appeared that the action was brought to recover a sum of money which had been paid by the bankrupt to the defendant subsequently to the bankruptcy, for certain malt supplied to him before the bankruptcy. In order to prove the payment of the money to the defendant, the plaintiff called the bankrupt's wife, (the bankrupt having released his assignees), but it was objected that, as the bankrupt himself had not obtained his certificate, she was an incompetent witness. The under-sheriff, however, received the evidence, and the plaintiffs obtained a verdict. *E. V. Williams* having obtained a rule to shew cause why there should not be a new trial, on the ground of the incompetency of the witness,

Chilton now shewed cause.—It is not intended to impeach the general rule, that the bankrupt, before he has obtained his certificate, is not a competent witness to increase his estate: but where he stands indifferent between the parties, or the interest preponderates against him, he is competent. Here there was a release, and

therefore he had no interest in the fund sought to be recovered. [Parke, B.—You say he has no interest in the fund because he has released it, but has he not an interest that his debts should be paid?] Certainly, if the assignees recover, his estate would be increased pro tanto; but at the same time the defendant would become a creditor against the bankrupt's estate to the whole amount. Nay, he might elect to proceed personally against the bankrupt, who is not certificated; so that in fact the interest of the bankrupt is to support the payment in his own discharge, rather than to defeat it, which exposes him to an action at the suit of the defendant. In *Jourdain v. Lefevre* (a), which was trover for a promissory note, Lord Kenyon was of opinion that the wife of a bankrupt was a competent witness to prove that the note had been paid to the defendants in contemplation of bankruptcy, and it was put upon that ground, that the defendants would be creditors against the bankrupt's estate to the amount of the note. It certainly does not appear in that case whether there was a certificate or not; but probably there was none, as otherwise it would have been adverted to. Undoubtedly the soundness of that rule has been questioned in the books on Evidence (b), but that was not on the ground of there being no certificate: and the decision does not appear to have been appealed against by any motion for a new trial. The case of *Reed v. James* (c) is quite analogous. That was an action by the assignees of a bankrupt against a judgment-creditor who had taken the goods of the bankrupt in execution; and it was held that the bankrupt was competent to prove that the creditor knew that the bankrupt was insolvent at the time of the execution. It appears that that case was afterwards moved in the Court above, and a rule nisi for a new trial granted, but not on the ground of the admission of the bankrupt's evidence, which

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(a) 1 Esp. 67.

(b) 2 Phill. 7th ed. 355, 356; 2 Stark. 134.

(c) 1 Stark. N. P. C. 134.

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was not even questioned. It could only have been received on the ground that he stood indifferent. The evidence of the bankrupt's wife was, therefore, properly received.

E. V. Williams, in support of the rule.—It is a well established rule that a bankrupt is not a competent witness, in an action by his assignees, to increase his estate, unless he has released to his assignees his share in the surplus and dividends, and also obtained his certificate. Here the general result of the action, if the plaintiffs succeeded, would be to increase his estate; for if they did not succeed, the estate would be so much less, not only by the loss of the amount sought to be recovered, but by the costs of the action, and the future effects of the bankrupt would, in consequence, be subject to a greater liability. In *Kennet v. Greenwollers* (a), it was held by Lord Kenyon, that a bankrupt who had not paid 15s. in the pound under a second commission, could not be a witness for the assignees under that commission, although he had obtained his certificate and released his allowance and surplus. [*Parke, B.*—It is not a necessary consequence that the assignees would be allowed the costs out of the estate by the commissioners. *Prima facie* they must pay them out of their own pockets.] Still, the immediate result, if the plaintiffs recovered, would be to increase his estate, and to discharge his future effects pro tanto. The nature of the proposed evidence cannot be gone into, as the objection arises on the *voir dire*, and as soon as it was found that the witness was the wife of the bankrupt, she ought to have been rejected as incompetent.

PARKE, B.—On the whole I am of opinion that the witness was incompetent, and that this rule ought to be made absolute. In the first place, it is said that the witness is incompetent, inasmuch as, being the wife of the bankrupt,

(a) Peake's N. P. C. 3.

she has a beneficial interest in the result of the suit, because, if the plaintiffs fail, the costs incurred in the action would be paid out of the estate, and so diminish the general fund, and become a charge on the estate. But that does not appear to me to constitute in law such an interest as to render the witness incompetent, because it is not a certain necessary legal consequence, in the event of the assignees failing in the action, that they should be able to obtain payment of the costs out of the estate. That will depend on the judgment of the commissioners, whose duty it is to settle the accounts between them and the creditors, and to say whether those costs ought or not to be allowed to the assignees as a fair expenditure legitimately incurred by them. The main ground of objection, however, is, that the bankrupt (and consequently his wife), has an interest in the assignees recovering the amount claimed, and that there not being yet a definite surplus, it is not a releasable interest. As the bankrupt has not yet obtained his certificate, it is obvious that a recovery of the money claimed in this case would increase the fund for the payment of his debts, in which fund he consequently has an interest; so that, unless there be some countervailing interest the other way, this witness is incompetent. But then it is said there is such a countervailing interest, and so I thought at first; for, if the assignees recover the amount claimed, the defendant, being a creditor of the bankrupt, could sue the bankrupt for it, who, not having his certificate, could not make his bankruptcy a defence to the action. But on consideration, that does not appear to be a result arising from the present action, for a verdict given here for the plaintiff could not be used in an action by the creditor against the bankrupt; it would be *res inter alios acta*, and not receivable in evidence at all. The liability of the witness is not the result of the present action, nor is it forwarded by the success of the plaintiffs in obtaining a verdict in it. If this money belonged to the assignees, no doubt the cre-

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ditor might sue the bankrupt for the amount, and it would be no answer for the latter to say he had already paid him, for the reply would be, that the money which he so paid was the money of the assignees. The case differs from that of a suit to recover money paid by way of fraudulent preference, inasmuch as there, some act to disaffirm the transaction must be done by the assignees, until which the money would not belong to them. It is not, however, necessary to pronounce any opinion on that point. As this witness, therefore, does not stand indifferent between the parties, but has an interest in assisting the assignees to recover this money, the rule must be made absolute.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

DAND V. KINGSCOTE.

By a deed, dated in 1630, the grantor conveyed in fee farm, land in the manor of A., in the county of Northumberland, "excepting and reserved out of the grant all mines of coals within the fields and territories of A. aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits:" with a covenant by the grantees that they, their heirs and assigns, "should give such accustomed recompense for digging and breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases."

By another deed of the same date, the same parties conveyed in fee farm, to other persons, lands in the manor of H. (adjoining A.) with a like exception, reservation, and covenant. *Quære*, whether under this reservation of a "sufficient wayleave," the coal-owner had now a right to make a railway, for the purpose of carrying the coals from the mines for shipment, with cuttings and embankments, and fenced in so as to exclude the owner of the soil.

Held, however, that the right was not confined to such ways as were in use at the time of the grant.

Held, also, that under the reservation of liberty of sinking pits, the right of erecting a steam-engine, and other machinery necessary for draining them, with all proper accessaries, passed as incident thereto.

Held, also, that under the reservation in the former deed, the coal-owner could not carry over A. coals got in H., although from part of the same mineral field.

To an action of trespass for breaking the plaintiff's close, and laying a railroad thereon, the defendant justified under the reservation in the above deeds. The plaintiff new assigned to the plea, that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default:—*Held*, that, on these pleadings, the plaintiff could not dispute that *some* species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner unauthorized by the reservation.

with breaking and entering a close called Cuddy's Close, in the township of Amble, in the county of Northumberland, and four other closes, called Kirton's Moor, Frontfield, Clark's North Moor, and Creswell's Moor, in the township of Hauxley, in that county, and with making and continuing excavations and embankments, and laying a railroad thereon, and with committing other the trespasses, on foot and with horses, carts, and carriages, therein enumerated. The second count charged the defendant with breaking and entering a close called Clark's South Moor, in the township of Hauxley, in that county, and with committing similar trespasses as are enumerated in the first count, and also with making in the last-mentioned close pits and ponds, and with erecting houses, cottages, and engines, &c.

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The defendant pleaded, to the trespasses in the first count, with cattle other than with horses, mares, and geldings; and as to the second count, except as to one pit, one shaft, one engine-house, and one edifice, not guilty; to which the plaintiff entered a nolle prosequi.

Thirdly (a), the defendant pleaded to the trespasses in Cuddy's Close in Amble, that Sir W. Hewytt and Thomas Hewytt, being seised of Cuddy's Close, and other lands in Amble, and of all the veins and seams of coal under all the lands in the township of Amble, on the 23rd of November, 1630, by bargain and sale enrolled, granted to Henry Lawson and Henry Horsley, Cuddy's Close and other lands in Amble, in fee, excepting and always reserved thereout all mines of coal within the said close, and also other the fields and territories of Amble aforesaid, together with *sufficient wayleave and stayleave* to and from the said mines, together with liberty of sinking and digging of pit and pits, for the winning of coal in Amble afore-

(a) The second plea, which set up a custom of the manor of Amble, became immaterial.

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said. The defendant then deduced a title to the coals, with the reserved liberty, from Sir William Hewytt and Thomas Hewytt to the Dowager Countess of Newburgh, and then, as her servant, justified the trespasses in Cuddy's Close, for the purpose of carrying away coals got in Amble. The plaintiff, by his replication, after admitting the seisin, deeds of bargain and sale, and title as deduced, replied *de injuriâ absque residuo causæ*, upon which issue was joined.

Fourthly, the defendant pleaded to all the trespasses in all the closes in Hauxley, that is to say, all the closes in the declaration except Cuddy's Close, that Sir William Hewytt and Thomas Hewytt, being seised in fee of those closes, and other closes and lands in Hauxley, and of all the coals under all the lands in the township of Hauxley, by indenture of bargain and sale enrolled, dated 23rd of November, 1630, conveyed to Richard Brown and Thomas Palfrey in fee, those closes and other lands in Hauxley, excepting always and reserved thereout all mines of coal within the same closes, and all other the lands and territories of Hauxley aforesaid, with sufficient wayleave and stayleave to and from the said mines; together with liberty of sinking and digging pit and pits for the winning of coal in Hauxley aforesaid. The defendant then deduced the same title from Sir William Hewytt and Thomas Hewytt to the Countess of Newburgh, and justified sinking a pit and getting coals in Clark's South Moor, and making railroads, &c., for the conveyance of these coals got in Hauxley. The plaintiff did not traverse this plea, but new assigned, as to the trespasses in the 2nd, 3rd, and 4th pleas, that the defendant committed these trespasses on other and different occasions, and for other and different purposes than those mentioned, and to a greater extent than was necessary, and in other parts of the closes. The defendant pleaded to the new assignment, that the closes in the declaration were in and parcel of the manor of Amble,

and that the late Earl of Newburgh was seised in fee of the manor, and veins and seams of coal, with liberty for himself and his heirs, seised of the manor, and the veins and seams of coal, of getting coals, and making pits in the lands of other persons, and making convenient and sufficient roads for carrying them away. The plea then stated a devise thereof to the Countess of Newburgh for life, and the defendant then justified, as her servant, in getting the coals and in carrying them away, under that liberty. The plaintiff, by his replication to this plea, traversed the seisin of the manor, and coals, and liberty, as alleged, whereupon issue was joined; and also new assigned that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which last new assignment the defendant allowed judgment to pass by default. A copy of the pleadings accompanies this case, and to which each party is at liberty to refer on the argument, and also to the several deeds and other documents of title set forth in the pleadings. The case came on for trial at the Northumberland Summer Assises, 1838, before Mr. Baron *Alderson*, when the 2nd plea to the declaration, and the plea to the first new assignment were abandoned by the defendant, and a verdict was taken by consent for the plaintiff, the damages to be assessed by an arbitrator according to the judgment of the Court, subject to the opinion of the Court on the following case:—

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The plaintiff, before and at the time of the trespass, was and is seised in fee, amongst other lands, of the closes mentioned in the declaration. The closes called Kirton's Moor, Frontfield, Clark's North Moor, Creswell's Moor, and Clark's South Moor, are in the township of Hauxley, and the other close, called Cuddy's Close, is in the township of Amble, in the county of Northumberland.

Whilst the plaintiff was in the occupation of the afore-

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said closes, about the month of January, 1837, the defendant sunk a pit in the close called Clark's South Moor, to get coals thereout, and erected upon the same close a building of stone, containing a steam-engine of fifty-horse power, for the purpose of drawing off the water, and raising the coal to the surface. The defendant also made a large pond, five feet in depth and 158 feet in circumference, for supplying the engine with water, and erected sheds and other works upon the same close. The shaft, engine, pond, and sheds, occupy altogether about two acres and a half of the land of Clark's South Moor. In the summer of 1839, the defendant caused a railway to be made from the pit in Clark's South Moor, for the transit of coal from that pit, which railway passed over that close, then across a public highway, then across Clark's North Moor, then across Kirton's Moor, then across Frontfield, all in the township of Hauxley; then across Cuddy's Close, in the township of Amble, and then for about half a mile over the lands of other persons in the same township, to a piece of land belonging to the Countess of Newburgh, adjoining the Coquet, and likewise in the township of Amble. The defendant has constructed a staith for the purpose of loading the coals brought along the railway from the pit, on board of vessels in the river Coquet, which is there a navigable river, at the distance of about 500 yards from the mouth, where it empties itself into the German Ocean. The pit in Hauxley is a quarter of a mile from the nearest boundary of Amble. The coal-seams lying in the latter township can be conveniently won by outstroke from the Hauxley pit, and be raised to the surface by means of the shaft in Hauxley, the shaft being sunk so as to win from it the coals from both townships. There is an extensive field of coal within these townships, of which the seams dip to the east, and reach to the sea and the river Coquet.

The railway was completed about the month of October,

1837; it is made of iron, fastened upon stone pillars or sleepers, which are sunk into the soil; it is of the breadth of eight feet, and severed from the remainder of the close by wooden rails on both sides of it. These wooden rails are necessary for the protection of the railway, and to prevent cattle from straying upon it. The entire space of ground between the wooden rails averages in breadth thirty-five feet. In making the railway, the defendant has cut the soil, and made embankments and dug ditches on each side of the railway, and broken down hedges separating the several closes from each other; and the defendant, by the wooden rails to fence the railroad, and by the cuttings and embankments, has severed one part of each field from the other. The defendant also made embankments and cuttings in Clark's South Moor, and in Creswell's Moor, for another railway to the south-west of the pit opened in Clark's South Moor, which railway was afterwards abandoned.

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The engine erected by the defendant is necessary for winning and working the lower seams, which are the principal seams in his coal field; and in erecting the steam-engine, and in other works of the colliery, he has expended about £30,000, for which expenditure there can be no adequate return, unless by the profits from an export trade. There is a highway leading from Hauxley to Amble, which is crossed by the railway between Clark's South Moor and Clark's North Moor, and after the railway passes out of the plaintiff's closes, but before it reaches the staith, it crosses another highway: but the expense of conveying coals to the place of shipment along either of these highways would be such as to preclude the defendant from exporting without loss. The place of shipment on the river Coquet is well chosen, and the railway connecting it with the pit has been judiciously designed and constructed; no unnecessary ground has been taken, nor injury been done, either in making the railway or erecting the engine, and forming

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the pond and other works connected with the colliery, and the defendant has been always ready to make compensation to the plaintiff for the damages occasioned by the acts complained of. Railways, such as the defendant has laid down, are now in universal use through the counties of Northumberland and Durham, in the case of collieries. Since the completion of the railway, and before this action was commenced, coals have been carried along it to a great extent, from the pit in Clark's South Moor to the place of shipment in Amble. These coals have been exclusively the produce of the seams in Hauxley, but have passed by the railway, as well over the plaintiff's close in Amble, called Cuddy's Close, as over his Hauxley closes, and large quantities of stone and wood for the purpose of the colliery have also been carried along it across the same closes.

The deeds, of which the following abstract is set forth, are to form part of the case. [The case then set forth an abstract of the following deeds:]

8th March, 1629.—Indenture between Edward Ditchfield and others, of the one part, and Sir William Hewytt and Thomas Hewytt, Esq., (his son and heir apparent), of the other part, being a conveyance, by appointment of the corporation of London, of the town of Amble, with its appurtenances, in the county of Northumberland, together with (inter alia) all those mines of coal there, with the appurtenances; and also of the town of Hauxley with its appurtenances, &c., &c.: habendum to Sir W. Hewytt and Thomas Hewytt, and the heirs and assigns of Sir William Hewytt for ever, to be held of the crown, as of the manor of Earl Greenwich, by fealty, in free and common socage.

23rd November, 1630.—Bargain and sale enrolled, between Sir William Hewytt and Thomas Hewytt, of the one part, and Henry Lawson and Henry Horsley of the other part (the indenture referred to in the third plea);

being a conveyance to Lawson and Horsley, of lands and tenements in Amble, parcel of the premises comprised in the foregoing deed; "excepting always and reserved out of this present grant, all mines of coals within the fields and territories of Amble aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits:"—habendum to Lawson and Horsley, their heirs and assigns, in fee farm, to hold of the Crown as before mentioned, at certain rents therein stated. This deed also contained a covenant from Sir William Hewytt, that he, his heirs, and assigns, should give and yield to Lawson and Horsley, their heirs and assigns, such accustomed recompense for digging and breaking the ground within the fields and territories of Amble aforesaid, in which any pit or pits for getting of coal should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases.

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Same date.—Bargain and sale enrolled, between Sir W. Hewytt and Thomas Hewytt of the one part, and Richard Brown and Thomas Palfrey of the other part, (the indenture referred to in the fourth plea), being a conveyance to Brown and Palfrey of lands and tenements in Hauxley, parcel of the premises comprised in the deed of the 8th of March, 1629, in the same terms, and containing the same reservation and covenant, as the conveyance to Lawson and Horsley.

1st April, 1785.—Lease from Lord Montague and Sir Herbert Mackworth, lords of the manor of Amble, to John Widdington, (through whom the plaintiff claims the closes in the declaration mentioned), Edward Cook, and William Smith, of all the coal mines and seams of coal belonging to the lessors, lying within and under the lands belonging to the lessees and other persons named, within the townships of Amble and Hauxley, in the parish of Wirkworth and manor of Amble, for nine years from the

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1st of May, 1785, at an annual rent of 21*l.* 5*s.*, on condition that they should not try for, dig, sink, win, or work the said mines or seams of coal, or in any manner impair or diminish the same: there was also a covenant by the lessees to the same effect.

The rent reserved by the said last-mentioned lease was regularly paid.

The defendant did all the acts above alleged to be done by him, claiming to do them under and by virtue of an agreement between Lady Newburgh and the defendant, and Mr. Thomas Brown, by which Lady Newburgh agreed to grant to the defendant and Brown a lease for a term of years of the coal-mines and seams of coal in Amble and Hauxley, with the right to dig pits, and wayleave and stayleave, and all other rights incident and appurtenant thereto.

The term *stayleave*, according to the custom and understanding of miners and other persons conversant with coal-mines, means a right in the coal-owner of having a station, where he may deposit his coals for the purpose of dispensing them to the purchaser. This place of deposit and vend is either at the pit-mouth, or, when detached, it is, in the case of land sale collieries, at some station by a highway, and, in the case of sea sale collieries, at a staith, trunk, or spout in some navigable water. *Wayleave* is the privilege of crossing land for the supply of coals to the purchaser. This privilege is generally the subject of detailed contracts, specifying the particular direction and extent of the wayleave, and there is no usage or understanding amongst persons conversant with coal-mines, by which to interpret the extent of the privilege, when conferred in the general terms used in the deeds above set forth. The narrowest enjoyment of a wayleave is where the sale is at the pit's mouth, and the purchasers cross to the pit with their carts from the highway. Where the sale is at a detached station, the grantee of a wayleave generally

sends coal to the station by means of a railway; in the case of sea sale collieries this is universally the mode of transit, and the railway is laid down in the most direct and commodious course from the pit to the place of shipment, for which the coal-owner can obtain leave from the land-owners, without regard to the intervention of highways.

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Coals have formerly been wrought for land sale in Amble and Hauxley, and for the supply of saltpans established there, and there are old shafts within those townships; but there was never any railway connected with these workings, neither had any steam-engine been erected in these townships for colliery purposes, before that of the defendant. Railways were not in use in 1630; but unless there was a steam-engine to drain the pit and raise the coal, and a railway and staith to ship the coals by the lower seams, the defendant's coal-field could not be worked without loss, as has been before stated.

The plaintiff contends, that, on the above facts, he is entitled to a verdict upon the several issues raised in the cause. If the Court should be of that opinion, the verdict is to be entered accordingly, otherwise to be entered as the Court may direct. The defendant, under the above circumstances, contends, that he is justified by the exception or reservation in the before-mentioned indentures, or some of them, in making the railway over the several closes, and in doing the other acts in working the coals in Clark's South Moor. The plaintiff contends, that the reservations or exceptions in these deeds give sufficient wayleave to the nearest highway, in the direction the coals are to be taken from the pit, for the conveyance of the coals, and no further; and that the defendant had no right to make this railway or any road over the highway above mentioned, through the lands of the plaintiff and the other persons; and that the defendant had no right under the deeds, to carry the coals raised in Hauxley over Cuddy's

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close in Amble, or to make a railroad over that close for such a purpose. Moreover, the plaintiff contends, that the defendant had no right to make embankments, or cuts, or sever the fields as stated, or to lay a permanent railway as done by the defendant; and that the defendant had no right to erect a steam-engine and engine-house, or make the pond, or the other erections in question.

The question for the opinion of the Court is, whether the defendant, to any and what extent, has, under the circumstances above mentioned, exceeded his power and liberty: and the damages, if any, are to be assessed by the arbitrator according to the opinion of the Court, and the verdict and judgment are to be entered up in pursuance thereof.

The case was argued in this Term by

W. H. Watson for the plaintiff.—The main question in this case is, whether, under an ordinary reservation of “a wayleave and stayleave” for the carriage of coal from a mine, a right to cut and lay down a railway is included; that being a species of way which was not in use at the period of the reservation. The recent case of *Doe d. Wawn v. Horn* (a) is an authority to shew that the making of a railway across land is an absolute ouster of the occupier of the land. So, where under a lease of wayleave for the purpose of carrying coals, with the liberty of laying waggon-ways over certain lands, the lessee made waggon-ways and inclosed them, so as to exclude all other persons, it was held, that he was ratable to the poor for the ground so inclosed, as having the exclusive occupation of it. *Rex v. Bell* (b). Here there is an absolute ouster of the plaintiff from his rights over the surface, instead of the mere user of an easement, consistently with his enjoyment of the surface. In *Vin. Abr., Chimin Private*, (D.) 2, it is said—“If

(a) 3 M. & W. 340; 5 M. & W. 564.

(b) 7 T. R. 598.

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a way which a man has becomes not passable, or becomes very bad by the owner of the land tearing it up with his carts, and so the same be filled with water, yet he which has the way cannot *dig the ground* to let out the water, for he has no interest in the soil:" citing *Dike and Dunston's case* (a). *Lord Darcy v. Askwith* (b) was an action by the assignee of the reversion against a lessee for years, under a lease containing, among the general words, "boscis, boscorum venditionibus, magnis arboribus, mineris carbonum," &c., for waste in felling oaks. The defendants pleaded that they felled those trees for the making of certain utensils in and about certain coal mines, parcel of the demise, and without which they could not dig and get the coals out of the pits, and that they bestowed the said trees accordingly; and upon demurrer, the Court held, "that the lessor did not, by implication of law, by leasing the coal mines, give power to fell the trees for the use of the mines, and that the rule of law, that the grant of a thing carried all things without which the thing granted could not be had, was to be understood of things incident and directly necessary." *Pit v. Lady Claverinth* (c) was a case more nearly applicable in its circumstances to the present. There, on the sale of a manor, the vendor, one Wray, reserved to himself and his heirs a *convenient wayleave*, such as he and his heirs should think proper, for the carriage of coals through a waste within the manor, from certain coal works of his to the river Tyne. An invention had been discovered about twenty years before, which at the time of the sale had come into frequent use in the north, of making *waggon-ways* for the more easy carriage of coals, which was done "by levelling ground from one place to another, and then laying planks into it, for making a more easy and short conveyance of them." The defendant, the lessee of some coal works under

(a) Godb. 52, pl. 65.

(b) Hob. 234.

(c) 1 Barnard. 318.

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the heirs of Wray, by virtue of the power in the reservation, made a waggon-way for her coals, upon which the plaintiff filed a bill against her. The Lord Chancellor made a decretal order, referring it to the Barons of the Exchequer for their opinion, whether a waggon-way was within the reservation of a wayleave; and they ultimately gave their opinions that a waggon-way was not reserved. *Selby v. Adair* (a) was a decision directly in favour of the plaintiff. In that case the Vice-Chancellor held that a railway was not comprehended within the reservation of a *wayleave*, in a grant of the date of 1680. *Senhouse v. Christian* (b), which may be referred to on the other side, is inapplicable to this case. There the party had granted to him "a free and convenient way, for carts, waggons, wains, and other carriages," over a slip of land therein mentioned, with full and free license to make and lay *causeways*, when and so often as there should be occasion, for the purpose of carrying (among other materials) coals; and it was held, that, under these words, he had a right to lay a "framed waggon-way." *Ashhurst, J.*, there says: "Under the original grant, he has a right to make a framed waggon-way, which is necessary for the purpose of carrying his coals; *it being in the contemplation of the parties at the time of making this grant.*" *Gerrard v. Cooke* (c) proceeded upon the same principle, that the grantee was entitled to all privileges necessary to give such a road, *as it was the intention of the parties* that he should have. That principle is clearly inapplicable to the present case. A way of a description not known at the time of the grant could not possibly be in the contemplation of the parties to it. The clause for compensation makes it dependent upon the *customary payments* before made; but none had been before made in respect of a railway; how then can the clause now be made to apply

(a) A. D. 1818, not reported.

(b) 1 T. R. 560.

(c) 2 N. R. 109.

to such a case? [Lord *Abinger*, C. B.—I do not see why, if the party has the right of way, he cannot lay down iron rails upon it.] He thereby precludes the owner of the land altogether from using the way, except with carriages of a peculiar construction; and the injury to the land is greater and more permanent. Further, it could not, at the time of this grant, have been expected that the grantor should afterwards purchase other land for the purpose of carrying away the coal. In *Com. Dig. Chemin*, (D. 5), it is said:—“If a feoffor grants a way from D. to Blackacre, and the feoffee afterwards purchases lands adjoining to Blackacre, he cannot justify the using the way to those lands.” *Howell v. King* (a). *Harris v. Ryding* (b) is an authority to shew that, under a reservation of coal and other mines, with liberty of ingress, &c., to get the mines, all that the party has by law is a *reasonable* mode of getting the mines, not injuring thereby the rights of the owners of the surface. The defendants here, therefore, had no right to erect steam-engines and machinery, to make cuttings and embankments, and to exclude the owner of the soil from the ordinary occupation of it, in the exercise of a way, which is a mere easement over the surface. But this railway is clearly an excess of the powers given by the reservation, because, at all events, the defendant is only entitled to carry it to the nearest highway, from whence he has the means of transporting the coals otherwise.

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Addison, *contra*.—First, a right to make railways for the carriage of the coals is given by this reservation, without reference to the intervention of highways. Secondly, the defendants had a right to carry the coals got in Hauxley over Amble, and vice versâ. The defendant is therefore entitled to a verdict on the issue joined on the third plea, and on the new assignment the plaintiff is entitled only to nominal damages.

(a) 1 Mod. 190.

(b) 5 M. & W. 60.

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It is said that the placing of the rails upon the way in question was *an eviction* of the plaintiff; and the case of *Rex v. Bell* is cited to shew that a railway is ratable, as being in the exclusive occupation of the proprietors. But it might as well be said the placing of pipes under the soil by a water company—which also are ratable—would be an eviction of the land-owner. *Doe d. Wain v. Horn* does not apply: the declaration here says nothing about any *expulsion* or *eviction* of the plaintiff. The authority cited from Vin. Abr. applies to the digging of trenches to let off water, which, unless done in exercise of a right to repair, (which is clearly incident to a right of way), would not be within the grant; and it does not appear from the case that it was necessary to dig trenches in order to repair the way. In *Pit v. Lady Claverineth*, the Court could only look to the terms of the reservation itself, in which there was no mention of waggon-ways; and it does not very distinctly appear what were the terms of the deed, or the grounds of the judgment. As far, however, as it is relied upon for the plaintiff, it is inconsistent with *Senhouse v. Christian*. The case of *Selby v. Adair*, when carefully examined, is rather an authority to shew, that, under the grant of a wayleave, a waggon-way might be made. [He then entered into an elaborate examination of the pleadings and proceedings in that case, in order to establish this.]

The question in this case is, in truth, nothing but a question of construction, arising on the face of these deeds—viz., what appears from them to have been the intention of the parties when this reservation was made. The Court, in deciding that question, will look to all the surrounding circumstances, and construe them *secundum subjectam materiam*. Now the reservation here is, first, of very extensive mines; secondly, of a wayleave and stayleave, sufficient for all the purposes of the enjoyment of those mines. Whatever is necessary for the fair and reasonable enjoyment of the thing excepted, is reserved as

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incident to the exception. Such is the general principle laid down in Sheppard's Touchstone (a):—"When any thing is granted, all the means to effect it, and all the fruits and effects of it, are granted also, and shall pass inclusive together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit." [Parke, B.—Under that rule things necessary only are granted: the case is not so strong in your favour as where the word *sufficient* or *convenient* is used.] The same principle is propounded in 1 Saund. 322, b., and 2 Rol. Abr. N., pl. 1, 2, 3. There are many cases illustrative of this general principle. Thus, in *Roberts v. Karr* (b), where A. granted to B. land of unequal width, described as abutting on a road on his own soil, which in the broadest part of it did abut on that road, but in the narrowest part was separated from it by a narrow strip of the grantor's land—it was held, that the grantor and those claiming under him were concluded from preventing the grantee from coming out into the road over this strip of land: that after the description given by him in the deed, he could not be allowed to say that the land on which it abutted was not the road. In *Morris v. Edgington* (c), a lessee demised a messuage, consisting of two parts, separated by an intervening reserved gateway and yard, subjected only to a specific right of way for the lessee to a third building, for a specific purpose only. The reservation, strictly interpreted, would have precluded the lessee from all access to the one part, which was accessible only by crossing the yard in one of two directions, the one by entering it from the back part of the residue of the demised premises, the other and more convenient way by entering it from the public street, through the reserved gateway. It was held, that the lessee was entitled to the

(a) P. 89.

(b) 1 Taunt. 495.

(c) 3 Taunt. 24.

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latter way, through the gateway and across the yard. *Mansfield*, C. J., there says:—"It would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." *Hodgson v. Field* (a) is a very strong case to illustrate the principle before stated. There, A. and B. being severally seised of parcels of woody ground, and B. having other lands adjoining to his woody ground, and intending to make a colliery under his ground, A. granted to B., his heirs and assigns, liberty for him and them to carry up a sough or drain through A.'s woody ground into B.'s woody ground, and to make two little sough pits in A.'s woody ground for the more easy and safe carrying up the tail of the sough, one of which was to be covered in forthwith, and the other way to be kept open for examining the sough, so long as was necessary for that purpose, and no longer. It was held, that, by this grant, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto. In *Gerrard v. Cooke* (b), A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from another house belonging to A., the right of using the said piece of land as a foot or carriage way, together with "all other liberties, powers, and authorities, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage." It was held, that, under these words, B. had a right to put down a flagstone upon this piece of land, in front of a door opened by him out of his home into it. [*Alderson*, B.—Suppose the way granted were across a ploughed field, would the grantee in such case have a right to lay down a flagstone?] Yes, if it were necessary for the con-

(a) 7 East, 613.

(b) 2 N. R. 109.

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venient maintenance of the road in such a state as that he might go over it. It was found in that case that the road might be used without the flagstone, though not so conveniently. In *Abson v. Fenton* (a), where, in a private act of parliament, for inclosing the waste lands of a manor, there was a reservation to the lord and his assigns of all mines, &c., "together with all convenient and necessary ways, &c., then already made or thereafter to be made, and liberty of laying waggon-ways, &c., at his and their free will and pleasure, and to do all such other works, acts, and things as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample, and beneficial a manner, as if that act had not been made:" it was held, in an action of trespass against the assignee of the lord, for laying a waggon-way over one of the allotments in an improper direction and manner, that the question to be decided by the jury was, whether the waggon-way had been laid in such a direction as a person of reasonable skill would have selected, and whether the mode adopted was such as a prudent person would have adopted if he had been making the road over his own land. That case shews, that whatever be the right reserved, the party is authorized to exercise it in the most reasonable and convenient manner. In the present case, if the defendant is to be confined to a way to these highways, leading only from one vill to another, the reservation will become futile. The case of the *Earl of Cardigan v. Armitage* (b) is an additional authority to the same effect. In *Senhouse v. Christian* (c), *Ashhurst*, J., states the question to be, whether, under the general grant for the purpose of carrying coals, the party "has not a right to make *any such way* as is necessary for the carrying of that commodity? There are no great collieries in the northern part of the kingdom, where they have not those framed waggon-ways; and the case itself expressly states, that the defendant cannot

(a) 1 B. & C. 195. (b) 2 B. & C. 197; 3 D. & R. 414. (c) 1 T. R. 560.

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so commodiously enjoy this way in any other manner. Therefore, under the original grant, he has a right to make a framed waggon way, which is necessary for the purpose of carrying his coals." Yet it appeared that this kind of waggon-way had been introduced into use since the date of the grant in that case (1722).

But further, there is in these deeds a compensation clause, which may well apply to the making of the roads in question; and the case states that the defendant has offered to make full compensation. The covenant by Hewytt is, "that he, his heirs and assigns, shall give and yield to [the grantees], their heirs and assigns, such accustomed recompense for *digging and breaking the ground* in the fields and territories aforesaid, in which any pit or pits for getting of coal should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed in like cases." This may well apply to all injury done by digging for any purpose connected with the getting or conveyance of the coal, in any part of the land where there are pits. It is necessary to dig in order to make ways, and the owner of the land would surely be entitled to compensation for the damage so done. The true construction is, to give compensation for digging or breaking the ground, not only for the purpose of opening pits, but for every thing incidental to the use of them.

Then the defendant is entitled to a verdict on the third plea. The case indeed finds, that no coals have been actually got by the defendant in Amble; but the road might nevertheless be made for the purpose of carrying away coal got in Amble. Then as to the new assignment to the fourth plea; it states only that the trespasses were committed "on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close" than those mentioned in the plea. The plaintiff thereby disputes only that the railway is properly made, and does not raise the

question whether any railway could be made. The plaintiff, therefore, is at all events entitled, on this issue, only to nominal damages, it not being suggested that any real damage or injury has been sustained by any improper mode of making, or any improper direction of, the railway.

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Watson, in reply.—First, as to the question on the new assignment. The plaintiff is entitled to recover, on that issue, damages in respect of all the acts done by the defendant beyond what he had a right to do by virtue of the reservation in the grant. The new assignment necessarily admits the right to make ways for carrying the coals, but alleges that the defendant has gone to a greater extent than was necessary for the exercise of the right reserved. It is altogether *excess*; which could not have been shewn on a traverse of the right alleged in the plea.

The plaintiff is equally entitled to judgment on the third plea. One purpose only is alleged in it for the making of the railway—viz., to carry away *coals got* in Amble. The defendant had no right, therefore, to lay down a way because *he may hereafter* get them; and there is nothing in the case from which to infer any present intention in the defendant to get the coals in Amble. Nor has he any right to carry coals got in Amble through Hauxley. The reservation is of the mines of coal within the territories of Amble thereby granted, with a way to and from those mines—i. e. through the territories of Amble. That deed contains no mention whatever of Hauxley; and the case finds that there are mines of coal in each manor.

It is not necessary to dispute the inferences which have been drawn from the cases cited on the other side; but they have no application to the present. The question here is, has a party, under a reservation made in 1680, a right to lay down a railway—a modern discovery, and whereby the land is actually severed, and the owner excluded? Could the defendant, under this reservation,

Esch. of Pleas, claim a right to make a canal, or a tunnel? The term 1840. "wayleave" is used to express a right of way *over the surface*, which shall leave the owner the full enjoyment of the soil, subject only to that easement. He has a right to obtain the produce of the land from the way itself. But here he is wholly excluded—ousted, according to the decision in *Doe d. Wawn v. Horn*, his fields severed into portions, and the communication between them taken away. With regard to the compensation clause, that clearly does not apply to the making of a way, but only to the digging and breaking the ground for the purpose of making pits, and in which the pits are made: there is no reference whatever in the covenant to the wayleave, although it had previously been expressly reserved. Besides, the clause refers to an "accustomed recompense;" and at that time it was not necessary, nor had ever been customary, to cut the ground in order to make a way; there were then none but land sale collieries, and all the old workings are close to the highway. In the case of *Morris v. Edgington*, the lease was construed with reference to the particular words employed in it, and to the state of things at the time it was made. Here, it is clear that at the time of the deed the parties never contemplated a railway. In *Hodgson v. Field*, the sough pits were absolutely necessary for the enjoyment of the right granted. *Gerrard v. Cooke* is subject to the same observation. In *Abson v. Fenton*, the words in which the reservation was framed were of the most general and ample kind—it included "all *convenient* and necessary ways, then already made or *thereafter to be made*," and "the liberty of laying waggon-ways, &c., at his and their free will and pleasure, and to do *all* such other works, &c., as might be necessary or *convenient* for the full and complete enjoyment thereof." That clearly comprehended ways then in use, or afterwards to be invented. In *Senhouse v. Christian*, again, the case is put upon the ground, that it was in the contemplation of the

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parties at the time. But, at all events, the right can only be to carry to the place at which the defendant has an outlet for the coals—viz., to the highway.

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Cur. adv. vult.

On a subsequent day in the Term, the judgment of the Court was delivered by

PARKER, B.—In this case, which was argued a few days ago, the Court were satisfied that the plaintiff was entitled to recover, but delayed giving their judgment, in order to look more attentively into the pleadings, and to ascertain exactly for what trespasses the plaintiff was entitled to compensation.

We entertained no doubt but that, under the exception of the deed of 1630 of the mines of coals in Amble, with the reservation of “sufficient wayleave and stayleave, to and from the said mines, with liberty of sinking and digging of pit and pits,” no easements were reserved, except for the purpose of getting the coals under the lands conveyed; or at all events the coals within the territories of Amble (whether the easements extended to the latter, it is not necessary to decide). In like manner, the easements reserved by the deed of the same date, in respect of the coals in Hauxley, could be exercised in respect of those coals only. It is impossible that the Court can give these deeds an effect greater than the words are calculated to convey, in consequence of the contiguity of the two townships, and the circumstances that the coals in each were part of the same mineral field. It therefore follows, that every trespass committed in Amble, for the purpose of conveying coals got in Hauxley, was unjustifiable, and the plaintiff is entitled to recover for them; he is therefore entitled to a compensation for every part of the railroad in Amble, and for the trespasses in carrying the Hauxley coals along it. The third plea, which justifies these trespasses under the

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deed of 1630, on which issue was taken, must be found for the plaintiff; as the allegation in that plea, that it was convenient and necessary to make a road or way in the closes in Amble, *at the time when it was made*, to convey coals got in Amble, was not proved. The second plea, founded on a supposed manorial custom, as also the special plea to the first new assignment, were also unsupported by the evidence.

It remains, therefore, to consider, for what trespasses in Hauxley the plaintiff is entitled to recover.

Those complained of are, first, the making a steam-engine, and pond for supplying it, and engine-house, and buildings; secondly, the making a framed railroad of iron on stone pillars or sleepers, from the pit in Hauxley direct to the boundary of Amble, to communicate thence with the river Coquet, with ditches and wooden rails on each side, embracing a width of thirty-five feet, and the construction of embankments, and cutting the soil, in order to make a *level* railroad. Thirdly, the making embankments and cuttings in two other fields, for a railroad, which was abandoned.

It will be proper to take the several heads of damage in their order. First, as the coals in all the seams are excepted, and a right to dig pits for getting those coals reserved, all things that are "depending on that right, and necessary for the obtaining it," are reserved also, according to the rule in *Sheppard's Touchstone*, 100. Consequently, the coal-owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits. The case finds that the steam-engine which was erected, was *necessary* for the winning and working the lower seams, which are the principal seams in that coal field; and therefore the defendant had a right to erect it.

The pond for the supply of the engine, and the engine-house, seem to have been necessary accessories to such an

engine, and were therefore lawfully made; but whether the sheds were, is not stated; and if there be a question as to them, the arbitrator may determine it. It may not be improper to observe, that a compensation seems to us to be due for the injury to the soil by making these adjuncts to the pit, the steam-engine, and its accessaries, as well as for digging the pits themselves, under the provision in the deed of 1630; whether there is any due for the railroad, is doubtful.

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The second head of damage is the construction of the railway to the boundary of Amble—the inclosing it, and the cutting the soil.

Upon referring to the fourth plea, and the new assignment upon it, (for it is not traversed), it appears to us that it is not open to the plaintiff to contend in this action, that *some* species of railroad made with stone, iron, and wood, was not convenient, proper, and necessary, under the terms of the reservation; nor that it was not necessary to cut the soil for the purpose of making it level, and to make a mound or embankment. These facts are all averred in the plea, and are not traversed; and the effect of the new assignment is, not strictly to *admit* the truth of these facts, but to withdraw them entirely from consideration as the subject of the action, and to preclude the plaintiff from complaining of them: and the true grounds of complaint are to be sought in the explanation of the declaration contained in the new assignment. These are for trespasses on other occasions, of which the special case supplies no proof—and for trespassing to a greater extent than was necessary for exercising the reserved rights, and in parts of the close where there was no right of wayleave.

This renders it necessary to look at the facts found in the case, to ascertain whether the railroad was constructed in a direction, or in a manner, unauthorized by the reservation.

This reservation is to be construed, according to the

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rule laid down in Sheppard's Touchstone, 100, in the same way as a grant by the owner of the soil of the like liberties: "for what will pass by words in a grant, will be excepted by like words in an exception." Now the reservation is of the right to dig a pit or pits, (which pits are mentioned in the compensation clause to be such as may thereafter *happen* to be sunk), and of *sufficient* wayleave and stayleave, connected with those pits. There is no doubt that the object of the reservation is to get the coals *beneficially* to the owner of them, and therefore it should seem, that there passes by it a right to such a description of wayleave, and in such a direction, as will be reasonably *sufficient* to enable the coal-owner to get, from time to time, all the seams of coal to a reasonable profit; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such a direction as is then convenient.

Adopting this rule of construction, the question is, whether the direction or mode of construction of the railroad were reasonably sufficient for the purpose of getting the 3rd seam of coal, in a manner beneficial to the coal-owner.

Upon the facts found in the case, we have some little difficulty in determining these questions satisfactorily.

It is found, "that without a railway *for shipment*, the lower seams could not be worked without loss, as *before stated*;" and the statement before made is, "that £30,000 was expended on the steam-engine, &c., and that *for that expenditure* there could be no adequate return, unless by the profits from an export trade." If it is meant (as probably it was) that this sum was necessarily expended, in order to work the lower seams in a reasonably beneficial manner, and therefore that a railway for shipment was necessary for the fair working of those seams, we cannot say that there has been anything improper in the direction or mode of construction of the railway. The direction was

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proper in constructing a railway for shipment, though it lead to a place where the defendant was a trespasser, inasmuch as it was convenient for the *purposes of the coal-mine*, which was the meaning of the reservation, and which is the only thing to be looked to in construing it; and whether the defendant would be liable to make amends for wrongful acts in constructing the railroad in another part of the same line, does not appear to be material, so long as the railroad remains unobstructed, and capable of being used in that place. The true question is, whether the entire railroad is convenient: when it is obstructed, (as it may be by the owner of the soil in Amble), and ceases to be passable, it will be no longer convenient for the purposes of the mines, and the part in Hauxley will not be lawfully used. The direction therefore was proper. Nor, upon the supposition that a railway for shipping was necessary, can we say there was any excess in the mode of construction; for the case finds that the railroad has been judiciously designed and constructed; that no unnecessary ground has been taken, or injury been done in making it. The fences and ditches to the railway do not appear to have been found by the arbitrator to be necessary, and therefore in respect of those the plaintiff is entitled to recover.

These observations will enable the arbitrator to assess the compensation.

The only remaining head is, the damage by the partial construction of the abandoned railroad. The defendant has by his conduct shewn, that a railway in that direction was unnecessary, and the plaintiff is entitled to recover for the damage occasioned by it.

Judgment for the plaintiff accordingly.

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HIBBLEWHITE v. M'MORINE.

The Brighton Railway Act, 1 Vict. c. cxix. s. 155, requires the conveyance of shares to be by writing, duly stamped, to be under the hands and seals of both parties. The clause afterwards calls the instrument a "deed or conveyance," and a "deed of sale or transfer."—*Held*, that this conveyance must, in order to satisfy the statute, be by deed: and therefore that an instrument of transfer of shares, executed by the proprietor of such shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser, was void.

ASSUMPSIT.—The declaration stated, that on the 10th of September, 1838, it was agreed by and between the plaintiff and defendant in manner following: that is to say, that the defendant had that day purchased from the plaintiff fifty shares in the Brighton Railway Company, to be transferred and delivered, and paid for, on or before the 1st day of March, 1839, or at any intermediate date that the defendant might require them, by paying the plaintiff for the said shares at par per share, together with all calls that might have been paid on the same by the plaintiff; the plaintiff thereby binding himself, his heirs, executors, and assigns, to execute to the defendant, or his nominee or nominees, a legal transfer of the said shares, for which the defendant was to make payment to the plaintiff on or before the 1st day of March, 1839: and it was understood and agreed, that the defendant should be entitled to all new shares that might accrue or be appropriated to the holder of the said fifty shares: it was also agreed, if the payment were not made on the 1st day of March, 1839, that the plaintiff reserved full power to resell the said fifty shares at the defendant's cost and risk, claiming from him any deficiency, or accounting to him for any surplus that might arise from the sale thereof. The declaration then, after an averment of mutual promises, alleged, that the defendant did not require the said fifty shares to be transferred and delivered to him at any time before the said 1st day of March, 1839, and that no new shares had accrued or been appropriated to the holder of the said fifty shares, before the resale thereof therein-after mentioned. It then averred, that *on the said 1st day* of March, and from thence to the resale thereof by the plaintiff thereafter mentioned, he the plaintiff was ready and willing to transfer and deliver the said fifty shares to the defendant, if the defendant would then have paid for the same; of which the defendant during all that

time had notice: and then, to wit, on the said 1st day of March in the year aforesaid, he the plaintiff offered the defendant to execute to the defendant, or any nominee or nominees of the defendant, a legal transfer of the said shares, on payment by the defendant for the said shares according to the said agreement, &c.: but the defendant did not nor would, then or at any time before the said time of reselling the same thereafter mentioned, accept and pay for the said shares, but altogether refused so to do; whereupon the plaintiff, after the said 1st day of March, and after such refusal and nonpayment by the defendant, to wit, on the 6th day of March in the year aforesaid, resold the said shares, and upon such resale there was a deficiency and loss to the plaintiff of 256*l.* 6*s.*, of which the defendant afterwards, to wit, on &c., had notice, &c. &c. [alleging nonpayment of that sum]. There was also a count on an account stated.

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Pleas—first, non assumpsit; secondly, (as to the first count), that the plaintiff was not ready and willing to transfer and deliver the said fifty shares to the defendant, if the defendant would have paid for the same, nor did the plaintiff offer to the defendant to execute to the defendant, or any nominee or nominees of the defendant, a legal transfer of the said shares, on such payment as in the said first count in that behalf mentioned, in manner and form, &c.; thirdly, that at the time of making the supposed agreement in that count mentioned, or at any time between that day and the said 1st day of March, the plaintiff was not the proprietor of the said fifty shares in that count mentioned, or of any of them, nor had he good right or title to execute a legal transfer of such shares, or of any of them, according to the said agreement in that behalf; concluding with a verification; fourthly, as to the breach in the first count lastly mentioned, that the plaintiff did not resell the said shares or any part of them, in manner and form, &c.; and fifthly, as to the same breach, that

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upon the supposed resale there was not a deficiency and loss, in manner and form as in that count alleged. There was a sixth plea, which was disposed of on demurrer (a).

The plaintiff joined issue on all the above pleas but the third, and to that replied, that on the 1st of March, the plaintiff was the proprietor of the said shares, and then had good right and title to execute a legal transfer thereof: on which also issue was joined.

At the trial before *Gurney, B.*, at the Middlesex Sittings after Trinity Term, 1839, the following appeared to be the facts of the case.

On the 10th of September, 1838, the plaintiff and a Mr. Sheldon each sold to the defendant, through their broker, Mr. John Golding, fifty shares in the London and Brighton Railway. The defendant signed the following written contract:—

“Mr. Hibblewhite, Liverpool, 10th Sept. 1838.

Sir,—I have this day purchased from you fifty shares in the Brighton Railway Company, to be transferred, delivered, and paid for on or before the 1st day of March, 1839, or at any intermediate date that I may require them, by paying you for the said shares at par per share, together with all calls that may have been paid on the same: you hereby binding yourself, your heirs, executors, and assigns, to execute to me, or to my nominee or nominees, a legal transfer of the said shares, for which I am to make payment to you on or before the 1st day of March, 1839. It is understood and agreed, that I shall be entitled to all new shares that may accrue or be appropriated to the holder of the said fifty shares. It is also agreed, if the payment be not made on the 1st day of March, 1839, that you reserve full power to resell the said fifty shares at any cost and risk, claiming from me any deficiency, or accounting to me for any surplus, that may arise from the resale of them.—I am, &c.

“Witness, J. FOUND.

GEORGE M'MORINE.”

(a) 5 M. & W. 462.

At the time of entering into this contract, the plaintiff was not himself the proprietor of any shares; but on the 12th September he went into the market, and purchased, through a sharebroker, 100 shares, at 12s. 6d. discount, to be delivered to him on the 15th of December following. On that day the plaintiff received 100 certificates for shares, in the form given by the act of Parliament, 1 Vict. c. cxix, s. 140, in the name of Richard Williams Pritchard, numbered from 81.625 to 81.734, together with three transfers from Pritchard, with blanks left for the purchaser's name, the consideration, and the date; one for forty shares, Nos. from 81.625 to 81.674 inclusive; another for forty, from 81.675 to 81.714; and the third for twenty, from 81.715 to 81.734 inclusive. The following is a copy of one of these transfers:—

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“London and Brighton Railway Company.

“I, Richard Williams Pritchard, of Liverpool, in consideration of the sum of _____, paid to me by _____ of _____, do hereby assign and transfer to the said _____ twenty fifty pound shares, numbered 81.715 to 81.734 both inclusive, of and in the undertaking called the London and Brighton Railway, to hold unto the said _____ executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said _____

do hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness our hands and seals this _____ day of _____ in the year of our Lord, one thousand eight hundred and thirty.

“Signed, sealed, and delivered by
the said R. W. Pritchard, in the
presence of

“RICHARD COBB, 1, Dale-street.

“R. W. PRITCHARD, (L. S.)

“Signed _____ (L. S.)”

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Between the date of the agreement and the 1st of March following, two calls of £3 each became due, which were not paid by the plaintiff; but evidence was given of a verbal agreement on the part of the defendant, that the plaintiff should not be required to pay up the intermediate calls, but that he the defendant would prefer taking the shares at their price before payment of those calls. On the 1st March, transfers executed by Pritchard, as above set forth, were produced by the plaintiff's broker to the defendant, and he offered to fill up the blanks for the name of the transferee, with the name of the defendant or his nominee, on the defendant's paying the agreed price. The defendant, however, refused to accept the shares; whereupon they were resold by the plaintiff at the then market price, and the present action was brought to recover the sum of 256*l.* 2*s.* 6*d.* and interest, being the difference between that and the price at par per share.

For the defendant it was objected, first, that the plaintiff was not entitled to recover, inasmuch as he was incapable on the 1st of March of making a good conveyance of the shares to the defendant, Pritchard being then the proprietor of them, and not the plaintiff; secondly, that the conveyance was invalid by the 157th section of the act of Parliament, the calls due before the 1st of March not having been previously paid; and thirdly, that the conveyance tendered to the defendant was void at common law, the name of the transferee not having been inserted in it at the time of its execution by Pritchard. On all or some of these grounds it was insisted that the defendant was entitled to a verdict on the second and third issues. The learned Judge overruled the objections, and a verdict was taken for the plaintiff for the amount claimed.

In Michaelmas Term, *Alexander* obtained a rule nisi for a new trial, on the grounds above mentioned; against which, in the same term,

Cresswell and *Cowling* shewed cause (a). [The arguments on the two first points are omitted, as the judgment

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(a) The following are the clauses of the act of Parliament, which are material to this case:—

Sect. 140.—The said company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards from time to time, to cause the names of the several corporations, and the names and additions of the several persons, who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares to which they are respectively entitled, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and after such entry made to cause the common seal to be affixed thereto; and the said company shall, from time to time, cause a certificate or ticket, with the common seal of the said company affixed thereto, to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said company the sum of two shillings and sixpence, and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all courts whatever as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein; but the want of such certificate or ticket shall not hinder or prevent the proprietor of

any of the said shares from selling or disposing thereof: and such certificate or ticket may be in the words or to the effect following: (that is to say),

“London and Brighton Railway Company:

“Number —

“These are to certify that A. B. of is the proprietor of the share (or shares) number of the London and Brighton Railway Company, subject to the rules and regulations and orders of the said company.

“Given under the common seal of the said company, the day of in the year of our Lord .”

Sect. 155.—It shall be lawful for the several proprietors of the shares of the said undertaking, and their respective executors and administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned, and the form of conveyance of shares shall be in writing duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties, as the case may require: (that is to say),

“I, A. B., of in consideration of the sum of paid to me by C. D. of do hereby assign and transfer the said C. D. share (or shares), numbered of and in the undertaking called ‘The London and Brighton Railway,’ to hold unto the said C. D., his executors, administrators, and assigns,

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of the Court proceeded upon the last only.] The question is, whether the transfer executed by the original holder, Pritchard, in blank, was capable of being used as a conveyance of these shares by the plaintiff to the defendant. It is contended, that a *deed* executed in blank is void, and cannot be used as an instrument of transfer to a purchaser, by afterwards inserting his name. But first, this instrument is not a *deed*. All that is required by the 155th section of the statute is, that the form of conveyance of shares shall be "by *writing* duly stamped." There is nothing to require an indenture. There are, indeed, subjoined to the form of conveyance there given, the words "as witness our hands and *seals*," &c.: but an instrument under seal is not

(or successors and assigns), subject to the several conditions on which I held the same immediately before the execution hereof, and I the said C. D. do hereby agree to accept and take the said share (or shares) subject to the conditions aforesaid, as witness our hands and seals, the day of . . . And on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said company, or by the secretary or clerk of the said company, who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which entry and indorsement the sum of two shillings and sixpence, and no more, shall be paid to the said company; and the said company, or the said secretary or clerk, is hereby required to make such entry or memorial accordingly, and on demand to make an indorsement of such transfer on the certificate of each share so sold, and deliver the same

to the purchaser for his security, for which indorsement no more than two shillings and sixpence shall be paid; and such indorsement, being signed by the said secretary or clerk, shall be considered in every respect the same as a new certificate: and until such memorial shall have been made and entered as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking."

Sect. 157.—No person or corporation shall sell or transfer any share which he or they shall possess in the said undertaking, after any call shall have been made for any sum of money in respect of such share, unless he or they at the time of such sale and transfer shall have paid the full sum of money which shall have been called for in respect of such share.

necessarily a *deed*,—even supposing it to be imperative by the statute to affix a seal, all that is said being that the instrument “may be in the following words, *or to the like effect*.” It is called, in other parts of the clause, the deed *or conveyance*,” and “the deed of sale *or transfer*.” It is submitted, however, that if it be in writing, and stamped, that is strictly sufficient to satisfy the requisitions of the statute. No delivery is required. To whom, indeed, could it be delivered? Neither of the parties who are to seal it is to have an interest in it; it is to be kept by the company or their officer. There may be a binding contract under seal, without delivery; but the instrument is not a *deed* without it. Warrants of attorney, awards, &c., are under seal, but are not therefore necessarily deeds. It is clear the seller could never mean to deliver this instrument absolutely until it were also delivered by the purchaser; he would not part with his interest until he had a transferee who was bound by the contract. Delivery, therefore, cannot be necessary in order to make the instrument effectual. Nor are any attesting witnesses required. There is no difficulty as to the stamp; that is required only for the purposes of evidence, and may be subsequently affixed on payment of the penalty; but the instrument is valid as a transfer without it. Many instruments which derive efficiency from the sealing, as a writ, may be sealed in blank, and filled up afterwards. That is always the case with respect to subpoenas. So, mercantile contracts are frequently signed in blank, and when afterwards filled up, become valid and effective instruments. Bills of exchange accepted in blank, upon a blank stamp, may be afterwards filled up to the amount of the stamp (a). So here, the signature of the proprietor is an authority to the bearer of the instrument to fill it up at any time with any name he thinks fit. It is more like a warrant of attorney, authorizing another

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(a) See per *Tindal*, C. J., in *Schultz v. Astley*, 2 Bing. N. C. 553.

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party to be substituted as the purchaser. A deed would not have been necessary for this purpose at common law; and the Court will not, unless compelled, construe the statute so as to make it necessary. All that is required is, that the Company may have possession of a document signed and sealed by both parties, to shew their assent to the transfer.

But, secondly, supposing that this instrument is to be considered strictly as a *deed*, yet a deed executed in blank, and delivered to A., to be by him handed over to the party who is to be benefited by it on performance of a certain act, when so handed over by A., is a good and valid instrument in law. *Texira v. Evans* (a) is precisely in point. There the defendant, wanting to borrow £400, or so much of it as his credit should be able to raise, executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond. The plaintiff lent £200 on it, and the agent accordingly filled up the blanks with that sum and the plaintiff's name, and delivered the bond to him. On non est factum pleaded, Lord Mansfield held it a good deed. [*Parke, B.*—Does it appear whether the agent was authorized by power of attorney?] No; but such authority would not be requisite to enable him to deliver, although it would be to sign or seal: *Shep. Touchst.* 57. The passage in Buller's *Nisi Prius*, 267, where it is said that "if there be blanks left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered," is not warranted by the authority there referred to, of *Pigot's case* (b), as stated in 2 Rol. Abr. 29, pl. 2, 3. That authority refers to an interlineation without the privity of the obligor. In *Hudson v. Revett* (c), where, in a deed of conveyance to trustees for

(a) Cited in *Master v. Miller*,
 1 Anstr. 228.

(b) 11 Rep. 27.

(c) 5 Bing. 269; 2 M. & P. 663.

the benefit of creditors, the particulars of whose demands were stated in the deed, a blank was left for one of the principal debts, the amount of which was not exactly ascertained at the time of the execution of the deed by the debtor, but the blank was filled up the next day in the presence and with the assent of the defendant, it was held that the deed was valid notwithstanding. Deeds of arrangement with creditors are always left blank as to the creditors, who afterwards sign. So, in the deeds of settlement of joint stock companies, blanks are left for such parties as may come in. *Markham v. Gonaston* (a) is an authority to the same effect as *Hudson v. Revett*, and is inconsistent with the unqualified dictum of Mr. Justice Buller. In *Jennings v. Bragg* (b), where a disseisee out of possession made a lease for years, and delivered it as an escrow to a stranger, recommending him to enter on the land, and then to deliver it as his deed, who did it accordingly, *Anderson, J.*, said it was a good lease, for it was not his deed until the second delivery, at which time he had good right and power to let it. There the execution and delivery are treated as one whole transaction, consisting of several parts. *Bayley, J.*, takes the same view in *Doe d. Lewis v. Bingham* (c), holding a deed, whereby a mortgagee conveyed to a mortgagor, and the latter reconveyed to trustees for securing an annuity, as "one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties," and therefore that any alteration made in the progress of such transaction, still left the deed valid as to the parties previously executing it, provided it did not alter their situation. The same doctrine is laid down in *Murray v. Earl of Stair* (d), and *Matson v. Booth* (e). In *England v. Roper* (f), it was

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(a) Cro. Eliz. 627; Moore, 547.

(b) Cro. Eliz. 446; 3 Bulstr. 215.

(c) 4 B. & Ald. 675.

(d) 2 B. & Cr. 82; 3 D. & R. 678.

(e) 5 M. & Sel. 223.

(f) 1 Stark. Rep. 304.

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held, that, in proving the execution of a bond, it is not necessary that the attesting witness should be able to state that the blanks were filled up at the time of execution. Lord *Ellenborough* says, "If the defendant has been foolish enough to sign in blank, he must take the consequences." This is not, in truth, the *alteration* of a deed, but the perfecting of one which was incomplete before.

Alexander and Tomlinson, *contra*.—First, this instrument is a deed. All the terms of the statute evidently contemplate a deed. It speaks of a "deed or conveyance," which conveyance must therefore be by deed. So, of a "deed of sale or transfer," i. e. "of sale or of transfer." A deed would be required at common law for the assignment of these shares, which are merely choses in action. Where a plaintiff declares, that by certain articles of agreement which he brings into Court, "sealed with the seal of the defendant" &c., it was agreed so and so—that is a good declaration in covenant. The argument, that a mutual delivery would be requisite in this case, applies equally to all cases of deeds containing mutual covenants. This is, no doubt, a deed from both parties to the Company, but also from the one party to the other, for the purpose of passing the interest in the shares. The Company's being a party is rather an additional reason for requiring a deed, in order to lay the transferee under more stringent obligations by means of covenants.

Assuming, then, that this instrument is a deed, it was void by reason of the non-insertion of the defendant's name, at the time of its execution by Pritchard. It is a general rule of law, that a deed cannot be altered in a material part after its execution: *Com. Dig. Fait*, (F. 1), *Pigot's case* (a), *Markham v. Gonaston* (b). [*Parke*, B.—This is not the case of an *alteration*.] In *Powell v. Duff* (c),

(a) 11 Rep. 27.

(b) Cro. Eliz. 626.

(c) 3 Campb. 181.

it was held that a bail-bond executed before the condition was filled in, was void. In *Weeks v. Maillardet* (a), it was held to be a good defence, upon non est factum, to an action of covenant on articles of agreement, whereby the defendant bound himself to deliver to the plaintiff by a certain day, "the whole of his mechanical pieces, *as per schedule annexed*," to shew that the schedule was not annexed at the time of the execution, although it was subscribed and annexed immediately afterwards, by the agent of both parties, but after one of them had left the room. There the deed contemplated the *addition* of the schedule, and yet the Court held that it could not be added after execution. There are, however, two classes of cases in which deeds have been held good, notwithstanding an alteration or subsequent addition: the one, where the alteration does not affect the other party to the deed; such are those of *Doe d. Lewis v. Bingham* (b), and *Hall v. Chandless* (c). In those cases the other party was benefited rather than injured by the alteration. Such also is the case where the name of an additional obligor is added to a bond after its execution by the obligee, who thereby obtains a greater security (d). The second class of cases is, where, at the time of the execution, there is something which cannot be ascertained, and is therefore to be filled up afterwards. To this class belongs the case of *Hudson v. Revett*, and deeds of composition with creditors: see *Johnson v. Baker* (e). There the deed becomes complete, on the assent of the parties to the alteration, by re-delivery. These cases do not, however, go so far as to permit the name of a purchaser to be inserted at any time after execution. *Tesira v. Evans* was only a Nisi Prius case, and the report of it is short and unsatisfactory: but if it be an authority for the plaintiff, it stands alone, and

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(a) 14 East, 568.

(b) 4 B. & Ald. 672.

(c) 4 Bing. 123; 12 Moore, 316.

(d) *Zouch v. Clay*, 2 Lev. 30; 1 Vent. 185.

(e) 4 B. & Ald. 440.

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 M'MORINE. as here, to be transferred from one to another, and filled
 up by anybody. If this be good, a conveyance of land
 might be executed in blank, and filled up by any one.

Cur. adv. vult.

In this Term, the judgment of the Court was delivered by

PARKE, B.—In this case, which was argued last Term, upon shewing cause against a rule for a new trial, we are of opinion that the rule must be made absolute.

It was an action brought by the plaintiff to recover damages for not accepting and paying for fifty shares in the Brighton railroad; which, by the contract, were to be transferred, delivered, and paid for, on or before the 1st of March, 1839, or at any intermediate date, that the defendant might require them, by paying for them at par, together with all calls that might have been paid on the same, the plaintiff binding himself to *execute* to the defendant, or his nominee, a legal transfer of the shares, on or before the 1st of March.

The declaration avers, that on the 1st of March, the plaintiff was ready and willing to transfer the shares, if the defendant would have paid for the same; and offered to the defendant, or any nominee of the defendant, a legal transfer. This averment was traversed in one plea, and in another it was pleaded, that at the time of the agreement, or on the 1st March, or between those times, the plaintiff was not the proprietor of the shares, nor had he good right or title to execute a legal transfer of such shares, according to the agreement.

The replication states, that on the 1st March, the plaintiff was the proprietor of the shares, and then had good right and title to execute a legal transfer thereof.

The question for consideration arises on those two pleas. Upon one or both, the title of the plaintiff to make the transfer may be questioned. It is not material upon which : but there seems no doubt but that it arises on the traverse of the readiness to convey, which must involve a capacity to do so, as there is no other averment in the declaration, which expresses or implies that the plaintiff had a title to convey on the 1st of March. It appeared on the trial, that between the date of the agreement and the 1st of March, some instalments became due, which the plaintiff did not pay ; and on the 1st of March, (before which day the defendant had not desired any transfer), the plaintiff's broker, who had purchased fifty shares from one Pritchard, produced to the defendant a conveyance executed by Pritchard, of these shares, with a blank for the name of the transferee, and offered to fill it up with that of the defendant or his nominee, on the defendant's paying the price. The defendant refused to do so. The plaintiff sold the shares, and the action was brought for the difference.

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The objections to the plaintiff's recovering were, 1st, that *he* was incapable of conveying on the 1st of March, because Pritchard was then the owner, and not the plaintiff ; 2ndly, that the conveyance was invalid by the express provisions of the Brighton Railway Act, 1 Vict. c. cxix, sect. 157, as the calls due before that date were not paid ; and 3rdly, that the conveyance tendered was void at common law, as there was a blank in it for the name of the transferee.

It is unnecessary for us to give any opinion, except upon the last of these objections ; but it may not be improper to observe, that there is great weight in the first, because the defendant has bargained for a conveyance from *the plaintiff*, which must be intended to be a conveyance in the statutory form ; and, consequently, for the implied covenant of *the plaintiff* for title, and Pritchard's implied

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covenant is not the same thing. The last objection, however, we are all of opinion, must prevail.

The second objection, which would otherwise have been valid, has been waived, as it appears on the evidence at the trial, that the defendant agreed that the plaintiff should not pay the intermediate instalments; and, as the contract with respect to shares of this description is not required by the Statute of Frauds to be in writing, since they are neither an interest in land, nor goods and merchandizes, there might be a waiver by parol. As there was such a waiver, the only objection would be to the statement of the contract in the declaration, on the ground of variance, which ought to have been made at the trial.

The conveyance required by the statute must, we think, be by deed; and a deed, with the name of the vendee in blank at the time it was sealed and delivered, is void.

The instrument of transfer, by the 155th section, must be under the *hands and seals* of both parties. It was argued, that it did not follow, from the instrument being under seal, that it was a deed; for warrants of justices, subpoenas, and awards, are under seal, and are not deeds. But this is an instrument containing a *contract* of the parties; if a contract is required to be by instrument under seal, it must be intended that it should be *by deed*: and the context shews that the legislature so intended it, for it is afterwards called a deed *or* conveyance, (probably a synonyme for the same thing), and a deed of sale or transfer, that is, a *deed* of sale or of transfer.

Assuming, then, the instrument to be a deed, it was wholly improper, if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle, that an attorney to execute and deliver a deed for another must himself be appointed by deed. The only case cited

in favour of the validity of a deed in blank, afterwards filled in, is that of *Texira v. Evans* (a), where Lord Mansfield held, that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston, in his edition of Shepp. Touch. 68, "as it assumes there could be an attorney without deed;" and we think it cannot be considered to be law. On the other hand, there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up.

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In Com. Dig. Fait, A. 1, it is said,—“If a deed be signed and sealed, and afterwards written, it is no deed. To the same effect is Shepp. Touch. 54. In *Weeks v. Maillardet* (b), the instrument had nothing to operate upon, as it referred to a schedule as annexed, which was not annexed at the time of execution; and it was held, that the subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed. So, where a bail bond was executed, and a condition afterwards inserted, it was held bad as a bail bond: *Powell v. Duff* (c). The cases cited on the other side were all of them distinguishable. In one, *Hudson v. Revett* (d), a blank in a part material was filled up; but, having been done in the presence of the party, and ratified by him, it was held that there was evidence of re-delivery. In another, *Doe v. Bingham* (e), the blanks filled up were in no respect material to the operation of the deed, with respect to the party who executed before they were filled up,—as to him the deed was complete. In a third, *Matson v.*

(a) Cit. 1 Anst. 228.

N. P. 267.

(b) 14 East, 568.

(d) 5 Bing. 372.

(c) 3 Camp. 181; and see Bull.

(e) 4 B. & Ald. 672.

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Booth (a), the point decided was, that a complete bond was not rendered void by the subsequent addition of another obligor with the assent of all parties.

It is unnecessary to go through the others which were cited on the argument. It is enough to say that there is none that shews that an instrument, which, when executed, is incapable of having any operation, and is no deed, can afterwards become a deed, by being completed and delivered by a stranger in the absence of the party who executed, and unauthorized by instrument under seal.

In truth, this is an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit.

Rule absolute.

(a) 5 M. & Sel. 223.

AMES v. LETTICE.

A motion for a new trial may be made at any time within four days after the return day of the *distringas juratorum*, although more than four days have elapsed since the trial.

IN this case *Stammers* moved for a new trial, but the Court entertained a doubt whether the motion was in time. The cause was tried before *Rolfe*, B., at the sittings in this term, but more than four days had elapsed since the trial. The *distringas juratorum*, however, was not returnable until the 29th of January, and this motion was made on the 31st. *Stammers* referred to Archbold's Country Attorney's Practice, 453, and the cases there cited, to shew that the motion might be made at any time within four days after the return day of the *distringas*, although more than four days may have elapsed since the trial.

ALDERSON, B.—I believe you are in time to move it.

The motion was accordingly made, and a rule was granted.

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CROSS and Others v. LAW, Public Officer, &c.

COWLING had obtained a rule calling upon Henry Arrowsmith and ten other persons mentioned in the rule, to shew cause why a suggestion should not be entered on the roll against them, as shareholders, for the damages and costs in this action, and why execution should not issue against them or any of them for the same (a). It appeared from the affidavits on which the rule was moved, that the plaintiffs had obtained judgment in an action against Law, as the public registered officer of the Imperial Bank of England, and that the persons mentioned in the rule were members of that Bank at the time of obtaining the judgment, and were believed to continue such at the time of making the affidavits. Simi-

The proper course of proceeding under the 13th section of the 7 Geo. c. 46, (the Banking Copartnership Act), which allows executions on judgments obtained in actions against the public officer of the company to be issued against any member or members of the company for the time being, is by *scire facias*, and not by suggestion on the roll.

(a) This rule was obtained under the 13th section of the 7 Geo. 4, c. 46, which enacts, that execution upon any judgment in any action obtained against any public officer for the time being of any corporation or copartnership carrying on the business of banking under the provisions of that act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a

member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, on which such judgments may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.

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Cresswell, Richards, and Crompton, shewed cause against the above rule.—The proper mode of proceeding in this case, where none of the persons mentioned in the rule are parties to the record, is not by suggestion on the roll, but by scire facias. Wherever a party, not originally chargeable upon a judgment, is sought to be charged in execution, the course of proceeding is by scire facias. A scire facias must be brought upon a judgment, to warrant an execution of it either by a stranger or against one: *Penoyer v. Brace* (a). In that case five defendants against whom judgment had been obtained, sued out a writ of error, but before the record was certified one of them died; upon which the plaintiff sued out execution against them all: and the question being whether he could do so without a scire facias, the Court held that there was no need to sue out a scire facias, because there was not any alteration of the record, nor any new person made liable to the execution. Here the direct contrary would be the case. *Bartlett v. Pentland* (b) may be relied upon on the other side, but that is not an authority on the point. There, the plaintiff having obtained judgment against the secretary of an Insurance Company, sued out execution against one of the members, without entering a suggestion, or applying for leave to sue out such execution; and the question was, whether the course actually taken was the right one, and not whether the entering a suggestion or suing out a scire facias was the proper course of proceeding. In all cases where the execution does not follow the judgment, and other persons are sought to be affected by it, there must be a scire facias: *Buxton v. Mardin* (c). It is clear that no person but the public officer is a party to the record, and

(a) 1 Lord Raym. 244; Salk.
319.

(b) 1 B. & Adol. 704.
(c) 1 T. R. 82.

it is by the plaintiff's own act, in availing himself of the privilege of suing the public officer, that he is the only party, and therefore he has no right to complain. Then, how are other persons to be made parties to the record but by scire facias? It is true, where there are several parties to the action, and some of them die, a suggestion may be entered, but that is by statute. If it is sought to affect a party in interest by making him a party to the record, it must be done by scire facias.

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The 6th section of the statute, 7 Geo. 4, c. 46, makes the returns rendered to the Stamp Office, evidence that the parties named therein were members at the date of the returns. But as those returns are made by the secretary to the company, or some other public officer, the meaning of the section cannot be that a third party who has been returned as a member shall be precluded from shewing that he is not a member; but if the argument be correct, that a suggestion is to be entered, he would be so precluded; as the suggestion, being entered by rule of Court, would not be traversable: *Rea v. Harris* (a). The proper course of proceeding is a scire facias, whereby a party would have an opportunity of shewing that he was not a member of the company, and ought not to be made a party to the record, which he would not have if a suggestion were to be entered. How are the members of the company to be made parties to the record in this mode? Are they to go on adding names to the record by suggestion, as the different persons become members of the company, or in what other way? The plaintiffs cannot proceed by this summary mode, when the old mode by scire facias is open to them. Besides, the effect of allowing such a course of proceeding would be to take away the subject's right to bring a writ of error. At all events, the rule prayed for is too large: the plaintiffs ought not to have applied for leave to issue execution.

(a) 3 Burr. 1333.

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Cowling, contra.—It is conceded, that so much of the rule as respects the execution cannot be supported, if objected to; but it is contended that the first part of the rule ought to be made absolute, and that the entering a suggestion on the roll is the correct mode of proceeding. In *Bartlett v. Pentland (a)*, Lord *Tenterden*, in delivering the judgment of the Court, says, "It was urged that the execution was irregular, as not being warranted by the judgment; and that there ought to have been previously entered on the roll a suggestion of such facts as were necessary to shew that the execution was warranted by the act of Parliament, so that an opportunity should be given to the person to be affected by it of demurring or pleading; and we are of opinion that the law is so." This act intended to give a summary remedy, and therefore never meant that a scire facias should be necessary; for a scire facias is a new action, and various pleas may be drawn and issues raised in it. It may be admitted, that the statute was probably penned by persons not conversant with the practice of the Courts; but sufficient may be collected from its language to shew that it was not intended that the mode of proceeding should be by scire facias. In a scire facias, a plea in abatement is admissible; but by the 13th section execution may go against *any* member of the company, which is inconsistent with a proceeding by scire facias, where the nonjoinder of the others could be taken advantage of. Again, it is an inflexible rule, that a party cannot plead that to a scire facias which he could have pleaded to the original action. In this case, Law could have pleaded to the original action, that he was not a public officer, or that no such company existed; and yet, if a scire facias were brought against any member under this statute, the latter would only be precluded from denying what appeared on the record, that is, he would only be precluded from de-

(a) 1 B. & Adol. 709.

nying that judgment had been recovered against Law as a public officer of a *supposed* public company; but he might still deny that Law was a public officer, and that such a company in fact existed; and yet this would be inconsistent with the intention of the legislature, which evidently was to expedite, not to delay, the remedy of the creditors of the Bank. [Lord Abinger, C. B.—But if we decide that a *scire facias* is the correct course, then it follows that the defendant will not be allowed to raise those points, since Law might have raised them in the original action.] In cases of *scire facias* there are different parties, as heir or executor, or a different judgment is sought than would otherwise be given, as in *Penoyer v. Brace*, and *Buxton v. Mardin*; but here there are no new facts, nor is there a new party to be introduced to the record; for as by the first section of the act, all the incoming partners are made liable for the notes issued, and the sums of money borrowed, and debts incurred, by the copartnership, they were impliedly parties to the record as the action proceeded; the public officer was not a mere nominal defendant for the parties who were partners at the time of the accruing of the debt, or of the commencement of the action, but for the several persons who might, from time to time, be members of the company. In fact, the legislature appears to have intended to make the company approximate to a corporation, which is well known to be the view entertained of partnerships by the mercantile world, by giving it some of the incidents of a corporation; and one of them is, the being sued in a particular name, and not individually. There is not, therefore, the adding of a new fact, or the making a new person party to the judgment. It resembles the ordinary case of suggestions on the roll. If a party to an action dies, the usual course is to have his death suggested on the record, and the action proceeds with respect to the survivors. In a company like the present, it

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would be very inconvenient to sue all the persons, members of the company at the time of the commencement of the action, and then add to or subtract from the names on the record those who became or ceased to be members during the progress of the suit; and the more so, because all this might be unnecessary, as the plaintiff might not recover in the action; and therefore the legislature directed that the action should proceed as if the changes had been suggested from time to time: but that if the plaintiff should recover, he should afterwards comprise in one suggestion the names of such persons, members of the company, as he should think proper to proceed against. The case, therefore, is analogous to the ordinary one of suggestions, and the parties will not be deprived of the benefit of a writ of error, or the like, since the suggestion may be demurred to or traversed: *Hickman v. Colley (a)*. It is not contended that the returns made to the Stamp Office by the officer of the Bank are conclusive.

Cur. adv. vult.

On a subsequent day, *Cresswell* having intimated that the Court of Queen's Bench had given its judgment in favour of the proceeding by *scire facias*—

Lord ABINGER, C. B., said—Such was the inclination of our opinions. I thought, on looking at the act of Parliament, without reference to any other matter, that it was implied that the Court must make some order for the purpose of ascertaining who were the proper parties against whom to put the judgment in execution; and it occurred to me, that the Court had authority to make such an order. It appears to me, however, to be possible, without the violation of any rule of law, to adopt the pro-

(a) 2 Stra. 1120.

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ceeding by *scire facias*, and which would seem to be the one most appropriate for such an occasion. We think this case is of too much importance for us to put any construction on the act of Parliament, by which parties who might wish to take the opinions of all the Judges would be prevented from doing so. It is true these joint stock banks place the public in a very disadvantageous position, for it now appears that in these cases there must, or probably will, be a trial of two actions instead of one: first, in order to establish the claim of the creditor against the company, &c.; and secondly, to fix the particular individual liable to execution. However, I do not see how we can adopt any other course than that which the Court of Queen's Bench, on consideration, has taken; and I think we justly may, by a very proper analogy to other cases of proceedings by *scire facias*, apply those proceedings to the present case. The rule is, wherever you seek to fix one party on a judgment given against another, it must be done by *scire facias*; and I think that is a principle which applies to the case of a public officer, who is merely the representative of the parties sought to be charged. It appears to me, and I believe that is the opinion of the Court, that the construction of the 13th clause of the statute must be taken to be this:—that the party who wishes to proceed upon the judgment against one of the members of the company not on the record, if he be a member at the time of the judgment and execution, would have a right to his *scire facias* without an application to the Court; but if the members against whom he should sue out execution should prove to be insolvent, he may then apply to the Court, so as to fix the original members at the time the contract was made, and make them still liable; in that case, he must come to the Court to have his *scire facias*.

ALDERSON, B.—It is proper that the Court should see

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that there has been a bonâ fide attempt made to fix all the members of the company for the time being before any execution be allowed to go against members not in that condition.

Rule discharged, without costs.

STOCKDALE and Another v. DUNLOP.

Messrs. H. & Co., being the owners of two ships, called the *Antelope* and the *Maria*, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm oil, agreed verbally to sell to the plaintiffs 200 tons of oil—100 tons to arrive by the *Antelope*, and 100 tons to arrive by the *Maria*. The *Antelope* did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The *Maria*, having 50 tons of palm oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the *Maria*, together with their expected profits thereon:—*Held*, that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

ASSUMPSIT.—The declaration stated, that before the making the policy of insurance thereafter mentioned, to wit, on the 31st July, 1838, certain persons carrying on the trade and business of merchants, under the name and style of Thomas Harrison & Co., bargained and sold to the said plaintiffs divers, to wit, 200 tons of palm oil, at a certain rate or price then agreed upon between the plaintiffs and the defendant, to wit, the sum of £36 per ton, to arrive by two ships of the said Thomas Harrison & Co., called the *Antelope* and the *Maria*, that is to say, 100 tons of such oil by the *Antelope*, and the other 100 tons by the *Maria*; and whereas also the said two ships, before the making the said bargain and sale, had been and were engaged upon a trading voyage to the coast of Africa for the said Thomas Harrison & Co., and, at the time of the making the said bargain and sale, were expected to arrive at Liverpool, in the county aforesaid, with cargoes on board thereof respectively, composed, amongst other things, of palm oil; and whereas also, after the making the said bargain and sale, to wit, on the 1st of September, 1838, the said vessel called the *Antelope* arrived at Liverpool aforesaid with divers quantities of palm oil on board, and the said Thomas Harrison & Co. delivered to the said plaintiffs 100 tons of palm oil there-

from, in part performance of the said bargain and sale of the said 200 tons of palm oil as aforesaid; and the said plaintiffs further say, that, at the time of the said bargain and sale, and of the making the said policy of insurance, the said plaintiffs had reason to expect that they would make divers great gains and profits, to the amount of the sum insured as hereinafter mentioned, in case the said part of the said palm oil so bargained and sold as aforesaid, to wit, the said 100 tons thereof to be brought by the Maria as aforesaid, should arrive by the said vessel called the Maria. The declaration then averred, that after the said bargain and sale, to wit, on the 13th September, 1838, the plaintiffs did make assurance, and cause themselves to be insured, with the defendants, lost or not lost, at and from twenty-four hours after the vessel's arrival at her first port and place of trade on the coast of Africa, and at and from thence to all or any ports or places on the said coast of Africa, or African islands, during her stay and trade on the said coasts and islands, with leave to proceed, &c., and thence to the United Kingdom, with leave to call, &c., upon any kinds of goods and merchandizes, and also upon the body, tackle, &c., in the good ship called the Maria, until she had moored at anchor twenty-four hours in good safety, &c. &c., valued at £500 *on profit*, free of average, and without benefit of salvage, for the sum of £150: that, whilst the said ship was prosecuting her voyage, divers large quantities, to wit, 100 tons, of palm oil were loaded and shipped on board the said vessel, and continued so loaded on board thereof from thence until the loss therein-after mentioned, and that the plaintiffs *were interested in the profits to arise and be made from the sale and disposal of the said palm oil* to a large value and amount, to wit, to the value and amount of all the money by them insured thereon. It then proceeded to aver a loss by the perils of the sea of the ship with the said palm oil on board thereof, on the 18th of July, 1838, whereby the said palm oil,

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and the expected profits, were wholly lost to the plaintiffs; of all which premises the defendant had notice, and was requested by the plaintiffs to pay the said sum of £150, which the defendant ought to have paid according to the form and effect of the policy so made by him. Yet, &c., [assigning as a breach the non-payment of the money]. There were also counts for money had and received, and upon an account stated.

To this declaration there were several pleas on which issues were joined, but the one which ultimately became important was the third plea to the first count, which was, "that the plaintiffs were not interested in the profits to arise from the sale and disposal of the said palm oil, in the said first count mentioned, in manner and form as in the first count is alleged;" on which plea the plaintiff took issue.

The cause was tried before *Maule*, B., at the Liverpool Summer Assizes, when it appeared in evidence that Messrs. Harrison & Co. were the owners of two vessels called the *Antelope* and *Maria*, trading to the coast of Africa; and that in July, 1838, the vessels being then expected to arrive in Liverpool with cargoes of palm oil, they agreed verbally to sell to the plaintiffs 200 tons of palm oil—100 tons of oil to arrive by the *Antelope*, and 100 tons to arrive by the *Maria*, at the price of £36 per ton. On the 1st of September, 1838, the *Antelope* arrived at Liverpool with 100 tons on board, which were delivered by Messrs. Harrison & Co. to the plaintiffs in pursuance of the contract. The *Maria* never did arrive, but, having struck the bar at the mouth of the River Brass on the coast of Africa, she was found, on examination, to be so much injured as to be rendered unseaworthy and incapable of proceeding on her voyage: and she was therefore unloaded and condemned. The *Maria* had on board only 50 tons of oil, the whole of which was transshipped, and arrived in Liverpool by other vessels. It was proved that the term "oil to

arrive” was a mercantile term, and that, if the oil did not arrive by the vessel, the purchaser had no right to it. It was contended at the trial, that the underwriters were not liable on this policy, on the ground that the plaintiffs had not such an interest in the goods, or the profits to be derived from them, as to make them capable of being insured. The learned Judge directed the jury to find a verdict for the plaintiffs, giving leave to the defendant to move to enter a verdict, on the above ground, on the issue raised on the third plea, as well as on other points reserved on the other issues in the cause, which ultimately became of no importance, the Court being of opinion that this issue ought to be entered for the defendant. *Cresswell* having in Michaelmas Term obtained a rule accordingly,

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Wightman and *Crompton* now shewed cause.—The question is, whether the plaintiffs had any interest in the goods or the profits, in respect of which they could effect an insurance: and it is submitted that they had, there having been a part delivery and acceptance, by the delivery of the 100 tons which arrived by the *Antelope*. Messrs. Harrison & Co. were bound to deliver the oil insured, and could not have objected that there was no written contract. There is no doubt that expected profits may be insured, and so may imaginary profits: *Lucena v. Craufurd* (a); *Thompson v. Taylor* (b). In the former case, *Lawrence, J.*, after citing the definitions of the contract of a policy of insurance, says, “These definitions, by writers of different countries, are in effect the same, and amount to this, that insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice, by the happening of the perils specified to certain things which may

(a) 2 N. R. 300.

(b) 6 T. R. 483.

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be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in anywise be of disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things." And he afterwards adds, "Interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation; but the having some relation to or concern in the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced, with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing." That statement of the law includes this case, for the plaintiffs had a moral certainty of advantage, and an interest in the subject-matter of the contract from the first, although they might not ultimately get the goods. So, in *Le Cras v. Hughes* (a), the captors of a prize at St. Omer were held to have an insurable interest in such prize, on the ground of their having a reasonable expectation of receiving from the Crown the property captured. It is not meant to be contended that a mere vague hope would be insurable; but this is not so, but a reasonable expectation of a profit. It is not necessary that it should be a strict legal right; an equitable one is sufficient; *Hill v. Secretan* (b). If there was reasonable ground to believe

(a) Cited in *Camden v. Anderson*, 5 T. R. 710.

(b) 1 Bos. & P. 315.

that Messrs. Harrison & Co., as men of honour, would fulfil their contract, that would constitute an insurable interest. *Clay v. Harrison* (a) was relied upon at the trial, but that case in truth is in favour, of rather than against the plaintiff. It is also distinguishable, because there the contract was abrogated, and consequently there was nothing on which the insurance could attach. In that case, A., in England, contracted with B. at St. Petersburg, to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods in transitu at Elsinore. A. having become insolvent, it was held, that his assignee under a commission of bankruptcy could not recover on the policy, inasmuch as A., after the stoppage in transitu, had not any insurable interest. The whole turned on the effect of the stoppage in transitu, and Lord *Tenterden*, after stating the question to be whether the bankrupt had an interest in the goods insured at the time of the loss, says, "We are of opinion, that, under the peculiar circumstances of the present case, the bankrupt, after the stoppage in transitu, had no property in the goods insured, and therefore the action cannot be supported." If Harrison & Co. had entirely repudiated the contract, and had said that they would not deliver the oil, then *Clay v. Harrison* might have been an authority against the plaintiffs, but not otherwise. At all events, here the part delivery established the contract, and made it valid. *Thompson v. Taylor* (b) is more in point. There a ship was chartered from London to Teneriffe, there to take on

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(a) 10 B. & C. 99.

(b) 6 T. R. 478.

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board a certain number of pipes of wine, and to proceed to Barbadoes, &c., for which the owner was to receive freight at the rate of so much per pipe; and it was held, that a policy of insurance on such freight attached from the sailing of the ship from London, and that the insurers were liable, though the ship was lost by being taken as a prize before she arrived at Teneriffe. That case is strong to shew that this was an insurable interest, for there the subject-matter of the contract was destroyed before the contract could take effect. *Lawrence, J.*, says—"It seems to me that the plaintiff had clearly an insurable interest. As to the objection that this was a speculative interest, this is not unlike a case (a) which happened a few years ago, where it was held that the profits of a cargo of molasses might be insured, notwithstanding the statute 19 Geo. 2, c. 37." That is an authority to shew that expected profits may be insured. [Lord *Abinger*, C. B.—Should there not be an interest in the ship, in order to legalize an insurance of expected profits? In that case there was a legal interest in the contract. *Parke, B.*—Where a man has goods on board a ship, then he may insure the expected profits to arise from them. But is there any interest either in the ship or goods in this case? It is not necessary that the party should have a legal interest in the subject-matter of insurance. There was a moral certainty and reasonable expectation of profits to arise from the goods, and that is sufficient. But if not, there was here a part delivery of the goods, which gets rid of the objection that there was no contract which could be enforced. [*Parke, B.*—That was after the loss.] Profits are an excrescence growing out of a principal matter; as was said by Lord Ellenborough, in the case of *Eyre v. Glover* (b), "an excrescence upon the value of the goods beyond the prime cost;" and the excrescence may be in-

(a) Referring to *Grant v. Parkinson*, Park on Insur. 305.

(b) 16 East, 218.

sured separately by another policy than that of the principal. [*Parke, B.*—It is clear that Harrison & Co. could have insured their profits, because they had the goods: but what interest had the plaintiffs in them? Harrison & Co. could have assigned them to a third person, and he could have insured: but that is a different case from the present.] The profits may be insured independently of the goods. In *Barclay v. Cousins* (a), the profits of a cargo employed in trade on the coast of Africa were held to be an insurable interest. So in *Henrickson v. Margetson* (b), which was an insurance at and from Hamburg to Bourdeaux, "on imaginary profits," Lord Mansfield said, "The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo; but the market varies, and may depend upon twenty-four hours sooner or later; so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost."—They also cited *Hodgson v. Glover* (c), and *King v. Glover* (d).

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Cresswell, Alexander, and W. H. Watson, contra, were stopped by the Court.

LORD ABINGER, C. B.—The question is, whether the plaintiffs had any insurable interest in the goods in question, and I am of opinion that they had not. The argument of the plaintiffs' counsel rests upon an analogy drawn from the law relating to insurance on freight. It is very true, where a party is entitled to the ship, either wholly or in part, the law will allow him to make a separate insurance on the freight. If there is a charter-party, and the ship is lost, he is entitled to recover for the freight. But if a ship is sent out for goods, and none are received on board, there is no interest to maintain an insurance on the

(a) 2 East, 542.

(b) *Id.* 548, note.

(c) 6 East, 316.

(d) 2 N. R. 206.

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profits. Where goods are received on board of a vessel, and a contract is made to secure them, then, if a loss arises, the assured may recover, because his receipt of the goods has been prevented by perils of the sea; for he has made a contract which he had great reason to expect would be performed. But the cases of freight are not analogous to cases of insurances on the profits to arise from the sale of goods. They stand upon the assumption that the party insuring has in his own power the subject-matter upon which the insurance is effected. In this case, the plaintiffs had no present interest, and none can attach on such a contract as this. If contracts for goods to be purchased in futuro were allowed to be the subject of insurance, it would be allowing a wager policy to be made. But such a doctrine would defeat the legislative provisions on the subject, and create an imaginary interest, which has no foundation in law. Here there was no written contract, nor any contract which the plaintiffs could have enforced. The cases of freight suppose a contract which is capable of being enforced. Here no interest in the goods was passed to the plaintiffs. There is a contract to sell 100 tons of palm oil, to arrive by the *Maria*; if the vessel do not arrive, or the goods do not arrive, the contract is void. Then where is the interest? The transaction amounts in effect to an insurance of a void contract.

PARKE, B.—I concur in opinion with the Lord Chief Baron, that the plaintiffs have no insurable interest. I admit that profits may be insured, but that is on the ground that they form an additional part of the value of the goods, in which the party has already an interest. Thus, the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee, or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. So may

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the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession. There the profits are insured as an additional value upon the goods, in which the insurer has a present interest. Here, however, the assured are not interested at the time of the goods being put on board, but only upon their arrival. They rely upon the honour of the vendor, that the goods shall be put on board the ship specified in the contract, and that they shall be delivered to them when the ship arrives. It is an engagement of honour merely. If it is not a contract capable of being enforced at law, it is nothing. The contract is to sell the goods when they arrive, but there was no memorandum in writing, and consequently no contract which was capable of being enforced, at the time either of the insurance or the loss; and if it ultimately did become capable of being enforced, that was only by the subsequent part delivery and acceptance, which was after the loss had occurred. At the time of the insurance and of the loss, there was merely an expectation of possession on the part of the plaintiffs, founded on the mere promise of the vendors, but there was a total absence of interest in the subject-matter of the insurance. There was no contract which could be enforced, but a mere promise on the part of Messrs. Harrison & Co. to deliver the oil when it arrived. There was no interest whatever, either special or general, in the cargo. The defendant is, therefore, entitled to a verdict on the third plea.

ALDERSON, B.—I agree with the rest of the Court in thinking that the plaintiffs had no insurable interest in the cargo of the ship *Maria*. The contract of the plaintiffs with Harrison & Co. was a mere verbal contract, incapable of being enforced.

GURNEY, B., concurred.

Rule absolute.

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CASE for the infringement of a ferry.—The declaration stated, that the plaintiffs, before and at the time of the committing of the grievances, &c., were lawfully possessed of a ferry across the river Mersey, “from the township, parish, chapelry, or place of Birkenhead, in the county of Chester, to the parish, township, or place of Liverpool, in the county of Lancaster:”—*Held*, 1st, that the plaintiff might recover under this declaration, although he proved a ferry both ways, as well from L. to B., as from B. to L.; 2ndly, that this description did not import a ferry from the whole township, &c., of B., to the whole parish, &c., of L., but that the plaintiff might recover on proof of a ferry from any point within B. to L.

Under a lease of a ferry, describing it as a ferry across a river both ways, a ferry across the river one way only will pass.

Semble, that the establishment of a ferry across the river Mersey, having its terminus in Birkenhead, within 400 yards of the plaintiffs' ferry, and upon which the defendants carried passengers and goods for hire in boats from Birkenhead to Liverpool, in itself imported an infringement of the plaintiffs' ferry, for which they might maintain an action.

The plaintiffs derived title to their ferry under a grant from Edward III. to the priory of Birkenhead. The defendants, in disproof of this title, sought to shew that there was a pre-existing ferry from Liverpool to Birkenhead, and from Birkenhead to Liverpool, which rendered the grant of Edward III. void as a grant of ferry. In order to shew that both were ferries one way only, the plaintiffs' from B. to L., and the other from L. to B., the plaintiffs gave in evidence certain proceedings in the Court of Chancery of the Duchy of Lancaster, temp. Chas. I., on an information filed at the relation of the then lessee of the latter ferry under the crown, Sir W. Molyneux, against the proprietor of the former, a Mr. Powell. The information claimed a ferry both ways, and sought to restrain the defendant from proceeding in certain suits in the Court of Requests at Westminster in disturbance of the right of the relator, and prayed process against the defendant to appear in the Duchy Court to answer the premises, and abide the order of the Court. Before answer, the Court made an order, purporting to be “in explanation of an injunction against the defendant to permit the relator peaceably to enjoy his ferry, and take the profit thereof in such manner as the same had been enjoyed for twenty years last past,” and whereby, (on affidavit on the part of the relator, stating that the occupiers of the two ferries had been accustomed for twenty years past mutually to account with each other at certain times and places agreed on, concerning the profits of the ferries, the occupiers of Powell's ferry paying to the occupiers of Molyneux's ferry half the profits of the freight laden on the Liverpool side and landed on Cheshire side, and the latter making some payments to the former for part of the profits of the freight laden on Cheshire side and landed on Liverpool side), the Court ordered that Powell should account and pay as had been accustomed, or in default an attachment should be awarded against him. The answer of Powell also claimed a ferry both ways, founding his title on the grant of Edward III. On the 6th of June, 1627, the Court ordered that an attachment should be awarded against the defendant for his contempt in not accounting according to the former order: and on the 11th of June, a further order was made, that the ferrymen on both sides should weekly account each to other according to the previous usage; that both sides should account each to other for the time past, before the next assizes: that the relator might take out an attachment de bene esse, that if the defendant and his ferrymen did not account accordingly they might be attached for their former contempts; and that in case the ferrymen of the relator did not account according to that order, an attachment should be awarded against them. It appeared that depositions were afterwards taken in the suit on both sides, but it did not appear what was its ultimate result.

Held, that none of the above orders were admissible in evidence, as not amounting to any final decree, or containing any adjudication of the Court upon the rights of the parties, but merely directing the continuance of a certain state of things pendente lite.

A right of ferry is a matter in which the public are interested, and as to which, therefore, reputation is evidence, and so also is a verdict or judgment of a Court of competent jurisdiction, touching the same right, although between other parties.

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certain ancient ferry, across and over a certain arm of the sea called the river Mersey, from the township, parish, chapelry, or place of Birkenhead, in the county of Chester, to the parish, township, or place of Liverpool, in the county of Lancaster (a), for carrying, conveying, and ferrying over and across the said river, from the said township, &c., of Birkenhead to the said parish, &c., of Liverpool, within the said ferry, all passengers and other persons having occasion for the same, and the goods and chattels of such persons, in boats kept by and by the authority of the plaintiffs there for that purpose, they the plaintiffs taking and receiving certain reasonable freights and ferryages, &c. Breach, that the defendants, contriving, &c., on the 1st of August, 1837, and on divers other days and times, &c., wrongfully carried and conveyed divers passengers and goods for hire in certain boats, over and across the said river, from the said township, &c., of Birkenhead to the said parish, &c., of Liverpool, and upon the said part of the said river where the plaintiffs had such ferry as aforesaid, and over, upon, and within the said ferry of the plaintiffs, whereby &c. Another breach alleged, that the defendants carried passengers and goods across the river, from Birkenhead to Liverpool, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry, &c.

Pleas—first, not guilty; secondly, that the plaintiffs were not lawfully possessed of an ancient ferry across and over the said arm of the sea, from Birkenhead aforesaid to Liverpool aforesaid, in manner and form as in the declaration alleged:—upon which issues were joined.

(a) The declaration, as originally framed, claimed the ferry *both ways*, from Birkenhead to Liverpool, and from Liverpool to Birkenhead; but subsequent investigation into the title having satisfied the plaintiffs

that their ferry legally existed one way only, viz. from Birkenhead to Liverpool, a Judge's order was obtained to amend the declaration accordingly.

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The cause was first tried before *Vaughan, J.*, at the Cheshire Summer Assizes, 1838. The plaintiffs claimed as lessees of a ferry across the river Mersey, from Birkenhead to Liverpool, called the "Woodside Ferry," under a lease granted to them in the year 1833, by Francis Richard Price, Esq., the alleged owner of the ferry. The defendants had, in the year 1837, set up another ferry across the river, from a point in Birkenhead called the Ivy Rock, about 400 yards to the eastward of the terminus of the Woodside Ferry, to Liverpool, which they called the "Monks' Ferry," and had built, on the Birkenhead side, a pier and hotel, and established steam-boats, which plied regularly during the day. It was for this alleged invasion of the plaintiffs' ferry that the action was brought.

The plaintiffs derived their title from letters patent under the great seal, dated 11 Edw. 2, A. D. 1318, and 4 Edw. 3, A. D. 1331. By the former, after reciting, that "from the vill of Liverpool, in the county of Lancaster, to the priory of Birkenhead, in the county of Chester, and from the said priory to the aforesaid vill, over ["*ultra*"] the arm of the sea there, *a common passage was had* ["*commune passagium habeatur*"], and that the men intending to pass over the said arm of the sea had hitherto been obliged to turn aside to the said priory, because in the place of the aforesaid passage there, there were not any houses for the entertainment of such men," whereby the priory was burdened beyond its means, by the exercise of the necessary hospitality, the King granted to the prior and convent of the said priory of Birkenhead his royal license to erect in the place of the said passage an inn or house of entertainment, for the benefit of the passengers. The letters patent of 4 Edw. 3, after inspecting and confirming the above grant, stated, that the King, "willing to do the said prior and convent a more abundant favour, and for the benefit of those wishing to pass over by water there, granted to the said prior and convent, '*quod ipsi et eorum successores in perpetuum*

habeant ibidem passagium ultra dictum brachium maris, tam pro hominibus quam pro equis, et aliis rebus quibuscunque,' and that they might receive for that passage as reasonably might be done."

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The plaintiffs next put in certain pleadings in a quo warranto, filed by the Attorney-General of the Palatinate of Chester, in the Court of the Earl Palatine, in 27 Edw. 3, (1354), against the prior and monks of the priory of Birkenhead, touching the claims of the convent, and, amongst others, this claim of a right of passage. The Prior pleaded, as to this part of the information, the above grant of the 4 Edw. 3, which he set forth. The Attorney-General then called upon him to state his tolls, which being stated, he replied that they were excessive. The record then contained an award of a venire, but it did not appear what was the result of the proceeding (a).

At the dissolution of the monasteries, 27 Hen. 8, (1535), the possessions of the priory of Birkenhead passed to the Crown: and in the 36 Hen. 8, (1544), the King's receiver of the rents of the late priory accounted to the Crown for "the profit of the ferry-house, and the boat called the ferry-boat, 4*l.* 6*s.* 8*d.*"

By letters patent under the great seal, dated in Nov. 1545, (37 Hen. 8), the King granted to Ralph Worsley, in consideration of 568*l.* 11*s.* 6*d.*, all the houses, lands, &c., of the late priory of Birkenhead, "and all the ferry and ferry-house, and boat called the ferry-boat, and all the profit of the same, with all and singular every of their appurtenances, &c.," to hold the same by the 20th part of a knight's fee, and an annual rent of 59*s.* 5*d.* The plaintiffs clearly deduced the title to the ferry, through several settlements and wills, from Ralph Worsley to Mr. Price, their lessor, and shewed the payment of the annual rent of 59*s.* 5*d.*, first to the

(a) This document was objected to on the second trial of the cause, and withdrawn.

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Crown, and subsequently to the grantees of the Crown, from the date of the grant to Worsley until the present time. The inquisitio post mortem of Ralph Worsley, the grantee, dated 15th Eliz., (1572), was read; whereby it was found that he died seised of the manor of Birkenhead, "and of a passage over the water of Mersey, *in Birkenhead aforesaid.*"

The plaintiffs then put in several documents for the purpose of tracing the title to another (as they alleged) co-existing ferry across the river Mersey, *from Liverpool to Birkenhead* (a); viz.:—

18 Hen. 3, (1228). Conveyance from Roger de Maressey to Ranulph, Earl of Chester, of "all his lands between the Ribble and the Mersey," for 40 marks of silver. This grant was confirmed by charter of King Henry 3, in the same year.

18 Hen. 3, (1228). Assignment to Agnes, wife of William de Ferrers, Earl of Derby, of the lands between the Ribble and the Mersey, as one of the sisters and coheir-esses of the said Ranulph, Earl of Chester.

38 Hen. 3, (1253). Grant of the King to Edward, his first-born son and heir, of the custody of all the lands which were of William de Ferrers, Earl of Derby, to be had until the full age of the heir of the same Earl.

41 Hen. 3, (1256). Account of Henry de Lee, bailiff of the Lord Edward, in which he rendered account (*inter alia*) of £10 "for the town of Liverpool, with toll, stallage, *passage, &c.*"

50 Hen. 3, (1265). Grant by the King to Edmund, his son, of the castles and lands of Robert de Ferrers, Earl of Derby, with all their appurtenances.

25 Edw. 1, (1296). Inquisitio post mortem of the Lord Edmund, brother of the King Edward 1, which found that

(a) This ferry was distinguished throughout the cause by the title of the *Liverpool ferry*.

he died possessed of (inter alia) "passagium ultra Mersey," worth by the year 26s. 8d. *Each. of Pleas, 1840.*

22 Edw. 3, (1349). Account of the King's minister, whereby, in his return for Liverpool, he accounted for (inter alia) the passage of a boat, &c., demised to John, the son of William del Mer.

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Leases, under the seal of the duchy of Lancaster, of the several dates of 2 Rich. 3, (1485); 20 Hen. 7, (1505); 20 Hen. 8, (1528); 37 Hen. 8, (1545—the same year as the grant to Ralph Worsley above mentioned); 1 & 2 Phil. & Mary, (1554); 28 Eliz. (1586), were put in. The first of these described the ferry as "the passage or ferry over the water of Mersey, between the town of Liverpool and the county of Chester, parcel of the duchy of Lancaster, together with the boat, and all other profits, issues, and emoluments to the same passage or ferry appertaining or in any manner belonging. The other leases described it variously as "a boat for a passage over the water of Mersey,"—"a boat and the passage over the water of Mersey,"—"the ferry-boat and the passage over the water of Mersey." The leases of 1545 and 1554 were (each for 21 years) to Sir William Molyneux, and that of 1586 to Richard Molyneux.

The plaintiffs then offered in evidence certain proceedings upon an information filed in the Court of Chancery of the duchy of Lancaster, 22nd May, 2 Car. 1, 1626, by the Attorney-General of the duchy, at the relation of Sir Richard Molyneux, against Thomas Powell, Esq., (great grandson of Ralph Worsley, and then owner of the Woodside Ferry) and two of his ferrymen.

The information stated, that the king was seized in his demeane as of fee, in right of his duchy of Lancaster, of and in the village, town, and lordship of Liverpool, with the appurtenances, in the county of Lancaster, and (inter alia) of and in a certain ferry or passage for the carrying and transporting of all passengers, goods, merchandize, and

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cattle, by one or more ferry boat or boats, at all convenient and fitting times of the year, from the said village, &c., of Liverpool, over the river Mersey, to a certain place called Birkenhead Wood, on the other side of the same river, and within the county palatine of Chester, and to all and every other place upon the other side of the same river, adjoining or abutting to, or upon the confines of, the said county palatine of Chester; and so, in like manner, from the said place called Birkenhead Wood, and other places in Cheshire, on the other side of the said river Mersey, to the said village, &c., of Liverpool. It then set forth a lease from the Crown, dated 10th May, 2 Jac. 1, (1604), under the seal of the duchy of Lancaster, to Sir Richard Molyneux, Bart., deceased, for a term yet unexpired, at a yearly rent of 14*l.* 6*s.* 8*d.*; and the devolution of the term, upon his death, to Sir Richard Molyneux, his son, the relator. It then alleged, that the defendants, intending wrongfully to dispossess the said Sir R. Molyneux of the ferry and passage, and to gain and acquire the same, and the fees and profits thereof, to them or some of them, &c., had of late wrongfully and unlawfully entered and intruded into and upon the said ferry or passage, and did wrongfully pretend, challenge, and claim the same ferry and passage, and the fees and profits thereof, to be the inheritance of them, or some of them; and had of late hindered, disturbed, and interrupted, and still did hinder and interrupt the said Sir Richard Molyneux, his servants, labourers, and assigns, of and in the said ferry and passage, to have, use, exercise, and enjoy the same with their boats and vessels, for the transportation of passengers, goods, and merchandize, from and to the several places aforesaid, and in manner aforesaid; and to receive and take the profits thereof, *according to the ancient usage heretofore used in that behalf*: and in further wrong to his Majesty, and his lessees and fermors of the said ferry or passage, the defendants, or some of them, had then of late

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made for themselves and used ferry-boats for the carrying and transporting of passengers, &c., over the said river, on the same ferry and passage, in as ample a manner as his Majesty, his leasees or fermors thereof, were rightfully entitled to do; and did wrongfully claim and use the said ferry or passage, and land their passengers and freight upon his Majesty's soil, within his manor or town of Liverpool; and did likewise take into the same ferry passengers and freight on Liverpool side, and land the same on Cheshire side, *without giving any recompense to his Majesty, or his leasees or fermors* of the said manor and ferry in respect thereof, &c. The information went on to allege, that the defendants had commenced several suits against Molyneux and several of his servants, in his Majesty's Court of Requests, touching the said ferry and passage, and thereby endeavoured to impeach his Majesty's title to the ferry, and the fees and profits thereof; and to stay due trial and proceeding in divers actions of account by the under tenants and servants of Molyneux against the defendants, touching the profits of the ferry; and had obtained orders and injunctions out of the Court of Requests for the investing and settling of the defendants in the peaceable possession of the ferry, &c.; and that such proceedings trespassed upon the King's right and inheritance in the ferry, and the fees and profits thereof, and to the derogation of the Duchy Court, &c. &c. And forasmuch as the town and lordship of Liverpool, and the said ferry and passage, and all other the things aforesaid granted to the said Sir Richard Molyneux, were in the county palatine of Lancaster, and within the order, survey, and jurisdiction of the Duchy Court, and all matters whatsoever for or concerning the same were more aptly and fitly to be heard, ordered, and decided in that Court than elsewhere, the information therefore prayed process against the defendants to appear in his Majesty's Court of Duchy Chamber, at Westminster, to answer the premises, and abide the order of the Court.

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The defendants first put in a joint plea or demurrer to the information, alleging that the ferry therein mentioned did not lie nor was to be exercised within the county palatine of Lancaster, but lay out of the body of every county, and was to be exercised and used over the river of Mersey, which river divided the counties palatine of Chester and Lancaster, and therefore the information did not allege any sufficient matter to entitle the Duchy Court to the jurisdiction thereof; and praying judgment whether the Court would take conusance of the suit. This plea was however overruled; and by an order bearing date the 25th Nov., in the same year, purporting to be "in explanation of an injunction formerly granted, by which the defendants were enjoined to permit and suffer the relator, and all claiming under him, peaceably and quietly to enjoy the said ferry and passage, and to take the profit thereof, in such manner and form as the same had been enjoyed for the most part of twenty years last past," the Court, "on consideration of an affidavit of the under fermor of the said ferry, whereby it appeared that the fermors of the said ferry of Liverpool, and the fermors and occupiers of the ferry claimed by the said Thomas Powell over the river of Mersey, had been used and accustomed for the most part of twenty years last past, and above, mutually to account with each other, at certain times and places agreed on between them, for and concerning the fees and profits taken by means of the said several ferries; and that mutual allowances had been made during all the time aforesaid each to other for the said profits, viz. that the fermors of the said Thomas Powell's ferry had always paid to the fermors of his Majesty's ferry the moiety or one half part of the benefit of such freight as was laden and taken in on Liverpool side, and landed on Cheshire side; and that likewise the fermors of his Majesty's ferry had made some payments and allowances to the fermors of Powell's ferry for part of the profits of such freight as was taken

into the ferry belonging to his Majesty's fermors on Cheshire side, and landed on Liverpool side;" ordered, that Powell, and all claiming under him, and all other persons using or occupying the said ferry, should, on sight of that order, account and pay to the fermors or occupiers of his Majesty's ferry, according as had been used for most part of twenty years past, or in default thereof, an attachment should issue against the said Powell, and all other persons using the said ferry.

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On the 2nd February, 1626-7, the defendant Powell filed his answer to the information, in which he set forth the letters patent of 4 Edw. 3, and the subsequent title to the ferry thereby granted, until it vested in himself: and (after denying the several allegations of the information) stated, that anciently, to wit, from the time of the grant made to the said prior and convent as aforesaid, and until of late years, the sole ferrying and transporting of passengers, goods, and cattle over the said river, in the aforesaid place, was by the tenants or servants of those under whom the defendant claimed his estate in the said ferry, and by no others: but that of late years certain of the townsmen of Liverpool had by little and little encroached upon his and his ancestors' right, in taking upon them to make a boat for the transportation of passengers, goods, and cattle, contrary to justice, and to the prejudice of the defendant; that he the defendant had not at any time made or used any ferry boats for the transportation of passengers, &c., but that the other defendant (his lessee) and other tenants of the ferry before him, had from time to time repaired the ancient and accustomed ferry-boats, and made new boats as occasion required; without this, that the defendant wrongfully claimed or used the said ferry, or otherwise than was lawful for him to do, or had commenced any suits against Molyneux, &c., for any other purpose than the quieting of the defendant, his tenant and servants, in the possession of the said ferry and of the profits thereof, &c.

On the 6th June, 1627, the Court made an order that

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an attachment should be awarded against the defendants for their contempt in not accounting according to the former order; and on the 11th June a further order was made, that Mr. Powell should cause his ferrymen to account, or else discharge himself by affidavit that he could not procure them to account, according to the former order of the Court: "and that the ferrymen on both sides should weekly account for the profits of the said ferries, each to other, as had been used for the most part of twenty years last past, and for such time past as the ferrymen on both sides had not theretofore accounted for the profits of their ferries, according as they had usually done for the most part of twenty years last past; that both sides should account each to other for the said time past at or before the next assizes to be held at Lancaster; and that the relator might take forth an attachment *de bene esse*, that if the defendant, and all other his ferrymen, should not account according to the tenor of that order, they should be attached in regard of former contempts appearing to the Court; and in case the ferrymen of the relator did not account according to that order, then an attachment to be awarded against them for their contempt in not accounting."

These proceedings were objected to by the defendants' counsel, as being inadmissible in evidence on two grounds: first, that the suit was *res inter alios acta*; and secondly, that there was no final decree or judgment. For the plaintiffs, *Laybourn v. Crisp* (a) was referred to, and on the authority of that case the learned Judge admitted the evidence. Certain depositions taken in the same suit, under a commission issued subsequently to the last order, were also tendered in evidence, but on being objected to, were withdrawn. It did not appear what was the final result of the suit.

The plaintiffs' counsel then put in several leases of the Woodside Ferry by the ancestors of Mr. Price. One of them, being a lease from Alice Price to William Woods, for seven

(a) 4 M. & W. 320.

years, dated 6th June, 1752, contained a covenant by the lessee to pay the yearly sum of 40s. to the Honourable Thomas Molyneux, "for the liberty of taking off passengers from Liverpool town side."—The lease from Mr. Price to the plaintiffs, which was dated 31st August, 1835, described the ferry as existing both ways, from Birkenhead to Liverpool, and from Liverpool to Birkenhead; and it contained a proviso enabling the plaintiffs to determine the lease upon six months' notice, in case a legal ferry should be established, by act of Parliament or otherwise, within five hundred yards of the plaintiff's ferry.

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The plaintiffs then called a number of witnesses, the result of whose evidence was, that as far back as living memory went, there had been a quay, and a regular establishment of boats plying at stated intervals, at Woodside, where the lessee of the ferry had always kept a public-house; carrying passengers formerly at 2d., but since the introduction of steam-boats, at 3d. a head; that during all the time sailing-boats were in use, the Liverpool *town-boats* had been in the habit of bringing passengers across to the Cheshire side: that they were never permitted to land them on the Woodside quay, or to take back passengers from the quay, except at one time on payment of a penny each, which was called the "landing penny;" that more or less resistance had also been made at different times to their taking back passengers from other parts of the Cheshire shore within the alleged limits of the Woodside Ferry, unless in the case of their bringing across parties for recreation, whom they were always allowed to wait for and take back. About twenty years ago, on the introduction of steam-boats, another ferry (so called) was established, with Mr. Price's permission, from a point about 800 yards to the eastward of the Woodside Ferry to Liverpool, which was called the Birkenhead Ferry; and since that time steam-boats had regularly run during the day on both these lines of ferry. In the year 1826, the

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then lessee of the ferry built a new and more commodious quay, or slip, about 100 yards to the westward of the old quay, which had since been disused. Before the existence of the present town of Birkenhead, there were few houses within the township, and the high road leading from Chester to the water-side came down to the shore at the point called Ivy Rock, and thence ran along the shore as far as the old Woodside quay; beyond which to the westward there was no regular road, but only the open shore of the river. Since the town of Birkenhead has been built, within the last fifteen or twenty years, this road has been destroyed, and the high road from Chester comes directly to the shore at Woodside: and between it and the river are several streets, and a considerable population.

An admission of the defendants' attorney was put in, whereby it was admitted, "that the defendants did, on the 1st day of August, 1837, and on divers other days before the commencement of this suit, carry and convey divers passengers and goods, for hire, in certain boats, from a point in Birkenhead called the Ivy Rock, to Liverpool, and back again." No evidence was however given of the carrying by the defendants of any particular individuals, or whence the persons carried by them came, further than that some of them were seen to come from the present Chester road.

At the close of the plaintiffs' case, *Cresswell*, for the defendants, applied for a nonsuit, on several grounds. First, that there was a variance between the declaration and the evidence, inasmuch as the declaration claimed the right of ferry generally from the township of Birkenhead to the parish of Liverpool; whereas the evidence was only of a ferry from a point within the township of Birkenhead, viz. Woodside, to Liverpool: that the declaration ought to have stated the actual termini of the ferry, and not having done so, and the statement being larger than the proof, the plaintiffs could not recover. Further, that the

declaration claimed the ferry one way only, but all the evidence was of the exercise of a ferry both ways, which also was a variance. Secondly, that inasmuch as a ferry could only exist, in point of law, as a part of a *highway* across a river or arm of the sea, for the purpose of communicating with highways or vills on either side, the right of ferry had been lost by the change of its site, on the construction of the new quay, whereby it no longer communicated with the ancient highway of which it was before a continuation; or that if the owner of the ferry could so change the site at his pleasure through an entire district, his duty being co-extensive with his right, he was bound to provide the public with the means of landing and embarking throughout the same limits; on which point he cited *Tripp v. Frank* (a). Thirdly, that there was no proof of any invasion of the plaintiff's ferry, inasmuch as it was not shewn that any of the persons carried by the defendants would otherwise have crossed in the Woodside boats, or that they came from the road which terminated in the Woodside ferry. Fourthly, that by the erection of the Birkenhead ferry, with Mr. Price's consent, he had lost his exclusive right: that if his right extended through the possessions of the priory, so also did his duty; and that by the license to establish the ferry at Birkenhead he had deprived himself of the means of performing that duty, and so had lost the right. The learned Judge reserved these points, and the case proceeded.

The learned counsel, in his address to the jury, contended, that it clearly appeared by the recital in the letters patent of 11 Edw. 2, that there was, at that time, an existing *ferry* (for that the word *passagium* must be so construed) across the Mersey, from Liverpool to Birkenhead, and back again; and therefore, that the grant of the

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(a) 4 T. R. 666.

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a license to carry passengers across the river, and receive a toll, without being subject to an information at the suit of the Crown, but not to give them any exclusive right of ferry, or to defeat the rights of the pre-existing ferry.

The defendants then called witnesses, whose evidence, in the main, was to the same effect as those of the plaintiffs, excepting that they spoke more strongly to the interruptions of the ferry by the Liverpool boatmen. They put in also other leases of, and minister's accounts relating to, the Liverpool ferry. From one of these leases it appeared that, at the period of the grant of the Woodside ferry to Ralph Worsley, in 1545, the Liverpool ferry was in lease to a subject. This ferry continued in the possession of the Molyneux family until the year 1777, when it was sold by them, together with the tolls, harbour dues, &c., of the town of Liverpool, to the Corporation of Liverpool; since which period the exclusive ferry right has never been exercised. An examined copy of the record in a cause of *Price v. Ellison*, Trin. T. 1773, was also put in. It was an action of assumpsit by Mr. Price, the then owner of the Woodside ferry, claiming to recover a toll of a penny, due from the defendant, for landing on the plaintiff's quay and land, within the limits of the ferry. In some of the counts of the declaration, the plaintiff claimed as lord of the manor of Birkenhead, in others as owner of the ferry. The declaration alleged the ferry as existing both ways. It appeared that the plaintiff had sued out several successive writs before he declared; and there was an entry of judgment of non pros., and of the taxation of costs for the defendant.—It was contended that the whole documentary title of the plaintiffs established a ferry (if any) both ways, and so disproved the ferry claimed by the plaintiffs: and that this view of the case was confirmed by the evidence of the record in *Price v. Ellison*; since, if it were a ferry one way

only, the owner of the ferry could never have considered himself entitled to the "landing penny" claimed in that action.

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The learned Judge, in summing up, stated, in the first instance, his opinion upon the points made by the defendant's counsel for a nonsuit:—1. That under the allegation of the declaration, that the plaintiffs were possessed of a ferry from Birkenhead to Liverpool and from Liverpool to Birkenhead, they might recover in respect of a ferry from any particular point in Birkenhead to Liverpool only, if it were established by the evidence. 2. That it sufficiently appeared from the evidence, that the site of the ancient ferry was the same, or very nearly so, with that of the present terminus at Woodside; and that it had in fact communicated with the highway leading thither. 3. That the facts stated in the defendants' admission, and the carrying by them of persons coming from the Chester road, were sufficient evidence to go to the jury of an invasion by the defendants of the plaintiffs' ferry. His Lordship, after stating the evidence, left to the jury the two questions, 1st, whether the plaintiffs, as lessees of Mr. Price, were possessed of an ancient ferry from Birkenhead to Liverpool; and, 2ndly, whether, if they were, the defendants had infringed that ferry. The jury found a verdict, on both issues, for the plaintiffs.

In the following Term, *Cresswell* obtained a rule nisi to enter a nonsuit on the several points reserved at the trial: and for a new trial, on the ground that the proceedings in the information against Thomas Powell had been improperly received in evidence; and also on the ground of misdirection:—1st, in the learned Judge's not having stated to the jury, that the grant under which the plaintiffs claimed was a grant, not of an exclusive franchise, but only of a license; and, 2ndly, in his having led them to conclude that the particular position of the ferry originally was not

Exch. of Pleas, material to the plaintiffs' right to recover.—In Easter 1840. Term, 1839, cause was shewn against this rule by

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The Attorney General, Temple, Evans, Jervis, and Welsby.

—I. First, as to the objection that there was a variance between the ferry stated in the declaration and that proved. It is not correct to say that there was no evidence that the ferry existed one way only. It appeared that there had never been any station for the Cheshire boats on the Liverpool side, or vice versâ, nor was there evidence of any obligation on the convent or their successors to maintain boats on the Lancashire side, or on the Liverpool ferrymen to maintain boats on the Cheshire side, as would necessarily have been the case in a tidal river of this description, had the right of ferry existed both ways. And thus the co-existence of the two ferries may be reconciled. But further, even if there was evidence to prove a legal ferry both ways, the plaintiffs were not bound to set forth the whole of their right in their declaration. [*Parke, B.*—If they have it both ways, they have it one way.] On this principle, in an action on the case for disturbance of common, where the right was alleged to be in respect of a messuage and 150 acres of land, it was held, that the declaration was divisible, and that proof of a right of common in respect of the land only was sufficient to entitle the plaintiff to a verdict: *Ricketts v. Selwey* (a). But it is further objected, that the plaintiffs claim the ferry over the entire district of Birkenhead; whereas they have proved it only from point to point. But the declaration is in the usual form when the ferry is claimed from point to point. The termini are never set forth by metes and bounds. It is alleged that the ferry is from this township, &c., of Birkenhead to Liverpool, because Woodside, the station of that

(a) 2 B. & Ald. 360; 1 Chit. R. 104, 112.

ferry, is within the township, &c., of Birkenhead. It might as well be said that the declaration claims the ferry all over Liverpool. It is unnecessary, therefore, to consider whether the right was more largely established by proof, because it is not claimed so extensively as is alleged by the defendants.

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II. Secondly, it is said there is no proof of the identity of the present site of the ferry with that granted by Edward 3. There is no foundation whatever for this objection: it clearly appeared that the site has ever since been at Woodside. That was until very recently the only station in Birkenhead, and must reasonably be taken to be the site of the house originally built by the Monks under the license of the Crown.

III. Thirdly, it is objected that there was no evidence of infringement of the plaintiffs' ferry by the defendants. On this part of the argument, the plaintiffs are entitled to assume that they have the right, such as they have alleged it. If so, can it be said that the defendants' admission was not evidence to go to the jury of an invasion of that right? If the ferry established by the defendants had been four instead of four hundred yards distant from the plaintiffs, the objection would equally apply. The point is a perversion of the doctrine established in *Huzzey v. Field* (a). [*Parke, B.*—There was certainly evidence to go to the jury of the defendant's carrying substantially from the same towns or vills. There is some difficulty in reconciling some of the cases with *Tripp v. Frank* (b): but this is not the case of carrying one passenger, but of building an hotel, and establishing steam-boats, by which they must have carried a multitude.] But independently of the admission, there was also evidence whence the jury might infer, that some of the persons carried came from Chester

(a) 2 C., M., & R. 432.

(b) 4 T. R. 666.

Exch. of Pleas, 1840. *PIM* *v.* *CURELL.* or other places in the interior of the country, to go by Woodside. [Lord *Abinger*, C. B.—Supposing you established that you had the ferry, can anybody doubt, that on a writ of *ad quod damnum*, the jury would have found this to be an invasion of it?]

IV. The next objection is, that the right of ferry is destroyed by the setting up of the Birkenhead ferry with the license of the owner of the Woodside ferry. [*Alderson*, B.—If the ferry be from point to point only, it can be maintained as well as before.] That is the answer to the objection. But even if the right be more extensive, existing within certain defined limits, there is no authority for saying that it is lost by the conveying away of a portion of the land within those limits. A right of ferry may exist wholly disconnected from the right in the soil on either side; and it would not be, *quà* ferry, rateable to the poor: *R. v. Ellis* (a). It is impossible that there can be a continuous quay throughout the whole district of the ferry right: it must be sufficient if the ferryman provide the public throughout the district with reasonable means of landing and embarkation. [*Parke*, B.—I understand the argument for the defendants to be, that by your declaration you are bound to prove a ferry throughout the whole chapelry of Birkenhead, and that you have not done so; but that, if you have, you have lost it by parting with a portion of the shore.] It is sufficient to answer that no such extensive right is in fact claimed.

V. With respect to the alleged misdirection, the summing up of the learned Judge, as stated in the report, is altogether free from exception. He stated to the jury, and expressed his opinion upon, the point as to the alleged variance; he left to them the conclusion to be derived from the usage; the question as to the identity of site, and also

(a) 1 M. & Sel. 652.

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as to the infringement. And as to the objection, that he did not leave it to them to say whether the plaintiffs had proved an *exclusive* ferry, or only a *license*, it was sufficient to leave to them the question, whether by the documents and the long usage taken together, the plaintiffs had proved that which they had alleged, an ancient legal ferry from Birkenhead to Liverpool. The word *passagium*, used in the grant of Edward 3, is the proper legal term to describe and convey a ferry: and it is the same word which is employed in the documents put in evidence to describe the Liverpool ferry. There is no doubt that the ferry at Woodside has in fact existed for more than five centuries. It has been granted and enjoyed with all the incidents of a legal ferry. There must have been an *actual passage* across the river for all the time; and it is doubtless that only which is intended by the "commune passagium" mentioned in the grant of Edw. 2. It is seldom that so strong evidence has been given of the existence of a legal ferry.

VI. The last, and most important question, is as to the admissibility of the proceedings temp. Car. 1, which were objected to at the trial (a).

First, this is a case in which *reputation* would be evidence, and in which, therefore, a verdict or judgment of a Court of competent jurisdiction, or a decree or order in equity, adjudicating upon the right in question, is also evidence, although it be *res inter alios acta*. This is a question *publici juris*. The navigable river is a great highway; the boats of the ferry may be considered as a bridge across it. If it be a legal ferry, the owner is bound to keep boats and a station, and is indictable if he fail to do

(a) At the close of the Attorney-General's argument, the other counsel for the plaintiffs were relieved from arguing all the points except this last.

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All the Queen's subjects have a right, in consideration of the toll, to be carried over it: *Payne v. Partridge* (a); *Huzzey v. Field*. It is, indeed, much more publici juris than the boundary of a manor or a parish. The case of *Reg. v. Sutton* (b) is very analogous to the present. There, on an indictment for the nonrepair of a bridge, charging the defendants with a liability *ratione tenuræ*, a record, setting forth a presentment, in the time of Edw. 3, against a Bishop of Lincoln, who was thereby charged with nonrepair of the same bridge, and liability to repair, a trial of this presentment at the assizes, and an acquittal of the Bishop as not liable, was held admissible in evidence for the defendants. It appeared from the same record, that the jury, being asked who was bound to repair, answered, that they did not know; and being asked when and by whom it was first built or repaired, said, about 60 years since, and then of alms by the Bishop of Lincoln. This finding also was held to be evidence. [*Alderson*, B.—That was when the jury were summoned *de vicineto*, and their functions were less limited than at present. *Parke*, B., referred to *Brett v. Beales* (c).] In *Res v. Antrobus* (d), the Court of King's Bench, on the trial of an information against the sheriff of Cheshire for not executing a criminal, held evidence of reputation that the sheriff was exempt and that the corporation of Chester were bound to execute, not to be admissible; but the propriety of that decision may perhaps be doubted. In the case of *The City of London v. Clerke* (e), which is the foundation of this class of cases, it was held, in an action on the case, in which the plaintiffs prescribed to have a toll on all malt brought by the west country barges to Lon-

(a) 1 Salk. 12; 1 Show. 232;
3 Mod. 294.

(b) 8 Ad. & E. 516; 3 Nev. & P.
376.

(c) Moo. & M. 416.

(d) 2 Ad. & E. 788.

(e) Carth. 181.

don, that verdicts obtained against other west country maltsters were admissible in evidence against the defendant, though he was neither party nor privy to those suits. On the same principle, in *Reed v. Jackson* (a), a verdict against one defendant in trespass, on an issue of a justification of a public right of way, negating the right, was held evidence in trespass for breaking the same close, against another defendant who justified under the same right. A navigable river being in law a public highway, that case is strictly analogous to the present. In *Rogers v. Wood* (b), the document tendered in evidence was held inadmissible, on the ground that it could not be considered as the decree of any court of competent jurisdiction.

Then the further question is, whether these orders of the Duchy Court, or any of them, were sufficiently final, or sufficiently adjudicatory on the right now in question, to render them receivable. There are many cases in which, upon similar questions, orders and proceedings not absolutely final have been admitted. In *Tooker v. Duke of Beaufort* (c), a commission under the seal of the Court of Exchequer, to inquire as to the boundaries of a manor, and an inquisition taken thereon, were held admissible in evidence, although not conclusive, on a question to seeking the same right. So, in *Brisco v. Lomax* (d), on a question as to the boundary between two manors, the finding of a jury summoned under a commission from the Duchy Court of Lancaster, to determine the boundary between those manors, on the petition of the then owners, was held admissible in evidence; although it did not appear that any steps had been taken after the return of the verdict to the Duchy Court. In those cases the commissions were only interlocutory proceedings, and do not appear ever

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(a) 1 East, 355.

(b) 2 B. & Adol. 345.

(c) 1 Burr. 146.

(d) 8 Ad. & E. 198; 3 Nev. & P.
308.

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to have been acted on to the extent of a final decree. In *Laybourn v. Crisp (a)*, on an issue directed by the Equity Court of Exchequer, to try the right of the deputy day-meters of London to the exclusive measuring, &c., of all oysters brought into the port of London for sale, and to the amount of their compensation, a decree of that Court, in 1788, in a cause between third parties, touching the same right, whereby an issue was directed to try the latter question only; and a subsequent decretal order, from which it appeared that the issue was found for the plaintiffs, and an account was directed,—were held admissible in evidence. [*Parke, B.*—That was a decree in the place of a verdict, which is the material thing. The important point is, to shew that this order recognises Powell's right to the Birkenhead ferry.] The proceedings appear to be these: Molyneux claims to be owner of the ferry both ways, and in effect prays an injunction against Powell—who also claims a ferry both ways—to restrain him from proceeding in certain suits instituted by him against Molyneux, in the Court of Requests, in order to establish his ferry right. Powell, in his answer, sets out his right, founding it upon the grant of Edward 3. The first order of the 25th November, 1626, is an order nisi only; but that of the 11th June, although not a final decree in the suit, is an order recognising and establishing the mutual rights of the parties, as owners of two co-existing ferries across the river Mersey. The existence of the several ferries is no longer disputed, but the question between the parties is, how they shall share the profits of each. It is an order as final as a Court of Equity had the power of making in the case, being an order restraining the party in the exercise of his admitted right. [*Lord Abinger, C. B.*—The difficulty is, whether it is not merely a provisional arrangement, without any decision, or distinct assumption of the existence

(a) 4 M. & W. 320.

of the right of ferry in the defendant.] The order is inconsistent both with the claim of the relator and of the defendant, to their full extent; but the Court proceeds on an assumption, that each is entitled one way only, viz. Powell from Birkenhead to Liverpool, Molyneux from Liverpool to Birkenhead; and therefore directs them mutually to account for the profits received by each, according to their previous usage, viz.—Powell in respect of freight laden on the Liverpool side; Molyneux in respect of freight laden on the Cheshire side. Unless a ferry in each one way were assumed, the order would have been to account both ways. Further, it is to account weekly for all future time. And it is clear it must have been upon consent, which renders it stronger, as an admission of the mutual rights of the parties. It is no doubt an *interlocutory* order; but it is one dealing with the rights of the parties. A Court of Equity does not, like a Court of Law, conclude the rights of the parties by one order or judgment. In *Horwood v. Schmedes* (a), an order to account is considered as a decree. It is such an order as that if the party who obtained it abandon it, it may be acted on by the other party. An appeal lies from interlocutory orders of a Court of Equity: *Wall v. Attorney-General* (b). The stat. 7 Geo. 2, c. 20, s. 2, which enables the Court, on bills of foreclosure, to proceed, on the defendant's request, to make an order or *decree* before a regular hearing, is a parliamentary recognition of the practice of the Court in this respect. After a mere order for an issue for trial of a right, and after trial, the Court does not allow the plaintiff to dismiss his bill: *Carrington v. Holly* (c); and so also, after a mere general decree to account: *Gilbert v. Faules* (d). Here there is finality enough to shew that the Court adjudicated upon the right. The Court had nothing further to do; they issued the pro-

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(a) 12 Ves. 316.

(b) 11 Price, 668.

(c) Dickens, 280.

(d) 2 Freem. 158.

Exch. of Pleas, 1840. } cess, and put into the hands of the party the means of using it. Upon the whole, therefore, it is submitted that the last order was rightly admitted in evidence, upon the principle established by the authorities which have been referred to; and if so, the previous proceedings were admissible as explanatory of it.

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Cresswell, Crompton, and E. V. Williams, in support of the rule.—I. The statement of the right in the declaration was negatived, the evidence being applicable to a ferry both ways. It is said this is immaterial, for that if the plaintiff proved more than he claimed, that would enable him to recover in this action. If this were like a right of common, or other easement, that would be true: in such cases there is no commensurate obligation or duty. But in the case of a ferry, there being corresponding and co-extensive duties to be performed by the proprietor, he must state his right correctly as against the public, in order that they may have from his statement a correct acknowledgment of the extent of his duties also. It is only by reason of the performance of the duty that he can support the franchise, and maintain his action for the invasion of it: see the *Y. B. 22 Hen. 6, c. 14*, referred to in *Huzzey v. Field* (a). The duty is in the nature of a consideration for his ferry: if the ferry exist both ways, his duty is to carry both ways: the consideration is not separable. It is like the case of a consideration for a promise; the whole consideration must be stated, though not the whole promise: so here, the whole right ought to be stated, because that shews what is the consideration. [*Parke, B.*—Suppose the plaintiff had produced a grant of a ferry, imposing also larger obligations, as, for instance, to keep a mile of road in repair—do you mean to say he must have stated all that?] It is a grant of an entire thing, and ought to be entirely stated. If the plaintiff were indicted for not carrying

(a) 2 C., M., & R. 436.

from Liverpool, this verdict would be evidence for him. *Esch. of Pleas*, 1840.

[Lord Abinger, C. B.—The great mass of the evidence was of a ferry one way only.] Then, if it were ambiguous which was the right, that question should have been left to the jury; whereas it was treated as being wholly immaterial.

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II. Further, this was a claim of ferry from the whole district of Birkenhead, and not from any particular part of or point within it; and as the right was proved as applicable to a single point only, viz. Woodside, in this also there was a variance. It is said the description in the declaration is only of a claim from any particular point within the district from which it might be proved. The precedents are all against such a general statement of the right. They either describe the ferry as existing from A. to B., or by a name given to it, as in *Tripp v. Frank*, and *Huzzey v. Field* (a). The particular locality of the ferry is material, and the owner cannot change it, as in the case of a market, to another point within the district. The very statement that a ferry is a highway over water, uniting two highways by land, shews this to be so: the site of a highway cannot be changed. If the site of the ferry be changed, it will no longer unite two highways. The Crown, therefore, could make no such general grant throughout a whole district, as is claimed by this declaration. At common law, all the king's subjects had a right to pass over navigable rivers; and in order to avoid the inconvenience of a precarious and uncertain transit, the Crown has the prerogative of granting a ferry to an individual, subject on his part to the duty of providing a

(a) *E. V. Williams* referred to a precedent in Serjt. *Williams's MS.* collection, in which the ferry was described, in some counts of the declaration by its name; in others as a ferry from A. in the county of C., to B. in the county of D., and

back again; and in others, as a ferry from a certain part of the shore of the county of C., between A. and B., to a certain part of the shore of the county of D., between E. and F., and back again.

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certain and invariable means of passage. Such a grant assumes, however, an existing highway. At all events, having once fixed the site of the ferry, by making a highway to communicate with it, the grantee cannot change it. But here the grant itself (if the declaration is to be taken as claiming a right over the whole district) shews that no such right was conferred: it shews there was a pre-existing ferry both ways, and an ascertained place of passage on the Cheshire side; and all the parol evidence applied to the terminus at Woodside: there was no evidence of any other, or of any ancient change of site. [*Maule, B.*—Suppose a plaintiff claimed a ferry from Middlesex to Surrey, must that be understood to mean from the whole of each shore? If it be unlawful from the whole frontage to the whole frontage, then, if the construction be ambiguous, it must be understood to mean from point to point.]

III. Thirdly, assuming it to be a ferry from point to point, there would be no infringement of it, unless by carrying *in fraud* of the ferry, or persons really desirous of going, and who would otherwise have gone, by the plaintiffs' ferry: *Tripp v. Frank, Huzzey v. Field*. The admission was accordingly so framed as to raise the point decided in *Huzzey v. Field*. It is like the case, where, in an action of trespass, the defendant admits the trespass, but puts the plaintiff to prove the right. It ought, therefore, to have been left to the jury to say whether the persons carried by the defendants were taken in order to defraud the plaintiffs' ferry, or *bonâ fide* to be carried to the other side for other purposes: otherwise it is merely *damnum absque injuriâ*. There are many authorities applying this principle to the case of markets: *Prior of Dunstable's Case* (a), *Blakey v. Dimsdale* (b), *Prince v. Lewis* (c). There are only three cases in the books relating to ferries, prior to the case of *Tripp v. Frank* (d); viz. the authority

(a) Y. B. 11 H. 6, 19 a.

(b) Cowp. 661.

(c) 5 B. & Cr. 363.

(d) 4 T. R. 666.

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already referred to in 22 Hen. 6, *Churchman v. Tunstall* (a), and *Blissett v. Hart* (b). *Churchman v. Tunstall* appears to be a disputed case. [Parke, B.—No: only the report of it in Hardres is incomplete. The statement of it in *Huzzey v. Field* is correct: the decision ultimately was for the plaintiff. The case of *Tripp v. Frank* appears to have applied the same doctrine to ferries as the cases above cited established with respect to markets. Lord Kenyon says,—“If certain persons wishing to go to Barton had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiffs’ right, and would be the ground of an action. But here these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say that no person shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them.” The same principle is adopted in *Huzzey v. Field*. If the plaintiffs’ present claim be sustainable, then, however extensive the town of Birkenhead may hereafter become, the whole population will be excluded from going, except by their ferry. Is it enough, then, to shew merely that persons have been carried by the defendants, who, but for the establishment of their ferry, *must* have gone by Woodside? Suppose there were no communication from the new town of Birkenhead to Woodside—would it then be an invasion to carry the inhabitants? Again, how does it appear that the parties would have gone by Woodside rather than Birkenhead ferry? The infringement, in respect of which alone the plaintiffs are entitled to recover, must be shewn to have been by carrying persons who were travelling by the highway which the Woodside ferry was established to connect.

IV. [The fourth point, as to the establishment of the

(a) Hardres, 162.

(b) Willes, 508.

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V. This was not a grant to the monks of an *exclusive ferry*, but only of a *license* to carry passengers for hire, without being subject to a quo warranto. If the pre-existing ferry, which is recited in the grant itself, were then in the Crown, it might lawfully make a subordinate grant to them of such a privilege. It does not appear that the Crown meant to abridge any right that the public had under the existing ferry, but to grant an additional benefit. At all events, the utmost that can be said is, that the terms of the letters patent are not so plain as to exclude a construction by usage: and all the evidence of enjoyment in this case was far more consistent with a right of this limited nature, existing concurrently with a ferry right both ways, than with an exclusive ferry from Birkenhead to Liverpool, in derogation of the other ferry. The learned Judge, therefore, ought to have left to the jury the user, and all the other circumstances of the case, to explain the ambiguity in the grant: he should have desired them to look at the grant concurrently with the usage, and to say whether it was a grant of an exclusive right, or only of a subordinate license of exemption from the existing monopoly. Suppose there had been a grant to the convent to sell butcher's meat in two particular streets, and it were afterwards set up as a market: on proof of a pre-existing market including those limits, the construction would necessarily be that the Crown granted only an exemption from the existing monopoly.—On this point, they referred to the case of *The Abbot of Strata Marcella* (a), and *Chad v. Tilsed* (b).

VI. Lastly, as to the admissibility of the proceedings between Molyneux and Powell. In the first place, evidence of reputation is admissible only where it relates to

(a) 9 Rep. 23a.

(b) 2 Brod. & B. 403; 5 Moo. 185.

rights in which all the public have an interest, and may, therefore, be expected to converse and inquire about them: and in the same cases, verdicts and judgments, in cases where the right has been enforced against the public, are admissible as being equivalent to a submission to the right by the public. But this was no proceeding against the public; neither of the parties set up any claim against the public. [*Parke, B.*—How then can you say the public have anything to do with it, where a party sues an individual for trespass on his soil, and he pleads a public right of way? *Lord Abinger, C. B.*—In a suit where a party seeks to establish a right of ferry against a party claiming a hostile right, *à fortiori*, he establishes it against the public.] In *Rex v. Antrobus*, evidence of reputation was excluded, on the ground that it was a question between the county and city sheriffs, in which the public were not interested. So here, what interest had the public in the question what accounting there was to be between these parties, which is the only matter to which these orders relate?

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But assuming that a *decree* between third parties, on the right in question, would have been admissible, these orders were not so. It appeared that the depositions tendered in evidence by the plaintiffs were subsequent to the last order: it is clear, therefore, that it was not a *final* decree. Nor does it contain or involve any distinct finding on the right at all: it is merely for the purpose of quieting the possession during the progress of the suit. This appears to have been a proceeding in the nature of a writ of intrusion, a jurisdiction over the matter in dispute having been wrongfully assumed by the Court of Requests, which appears, from the description of it in the 4th Inst. 97, to have been a kind of illegitimate Court of Equity. The information only prays process to compel the defendants to appear in the Duchy Court, and abide its order. There is a similar prayer in

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Walsingham's case (a), which was a bill of intrusion at the suit of the Crown. It appears from *West's Symboleography*, p. 292 of Pleadings in the Exchequer, that the form then was to pray the quieting of possession until the hearing. Here, an injunction, though not prayed in terms, is applied for contemporaneously with the information. As far as relates to the order for an injunction, that clearly was no adjudication on the right; it is merely *ex parte*, in furtherance of the plaintiff's bill. The next order (which was before answer) is only in further explanation of the injunction. Powell was then in contempt for disobedience to that order. Then the order of the 11th of June, 1627, is made in consequence. There appears to have been some dispute as to the terms of the injunction, and they are accordingly settled, for the purpose of quieting the possession *pendente lite*. With regard to the argument drawn from the stat. 7 Geo. 2, c. 20, s. 2, that is rather in favour of the defendant; for the statute assumes, that, but for its provisions, the order could not be made before hearing: it is a parliamentary exception. Here the answer involves no admissions; it is altogether in denial of the right claimed by the information: and it is founded altogether on the future depositions—it states that the defendant “hopeth to prove,” &c. &c. This is a proceeding analogous to the appointment of a receiver at the present day, or an order for the settling of the possession *pendente lite*, in a suit for a specific performance: *Gibson v. Clarke* (b), *Pitt v. Davis* (c); a mere provisional arrangement, in no respect decisive of the right in dispute. The cases cited on the other side are altogether distinguishable: in all of them there was a verdict or judgment of a Court of competent jurisdiction upon the right in dispute.

Cur. adv. vult.

On a subsequent day in the same Term,

(a) Plowd. 547.

(b) 1 Ves. & B. 500.

(c) 3 Russ. 182, n.

Lord ABINGER, C. B., said—In this case, which was argued the other day at so much length, the Court have come, perhaps I should say with some reluctance, considering the great expense of this proceeding, to the opinion that there ought to be a new trial, on one ground, and on one ground only; and that is, the admission of the evidence of the proceedings in the Court of Chancery of the duchy of Lancaster, which were objected to at the trial. At one time, I thought that these proceedings might be looked at as proceedings in equity in order to adjust the interests and rights of both parties, because it appeared, especially upon the very ingenious argument of Mr. *Jervis*, and upon a partial inspection of the documents, as if the suit in the Court of Requests, which had been commenced by the parties under whom the plaintiff claimed, had been stayed by injunction from the Court of Chancery of the duchy, for the purpose of adjusting, not only the rights of the relator who claimed under the Crown in the suit in the Duchy Court, but also of the party who had commenced the suit in the Court of Requests, and who is represented by the plaintiffs in the present action; but, upon looking further at the proceedings, that does not appear to have been the case. The documents which were received in evidence by the learned Judge consist of two interlocutory orders of the Duchy Court; and it appeared to us, at one time, that the second of those orders might be considered as a final order, and that no further proceedings had been contemplated by the parties. It very often happens in the Court of Chancery, that an order is made for adjusting the rights of parties, and if both are satisfied with it, they remain quiescent, and seek for no further judgment of the Court. But there are several circumstances in this case that tend to shew that this was not so here. In the first place, it appeared upon the learned Judge's note, that, on the plaintiffs' counsel offering certain depositions in evidence, an objection was made that there was no decree on

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those depositions, and they were accordingly withdrawn. Now those depositions were clearly taken after the order in question, and that shewed it was not in the contemplation of the parties, or of the Court, that the order should be a final one. Again, when we come to look at the proceedings regularly in their order—the bill, answer, and orders—it appears that it was not the intention of the Court to decide upon the rights of either party; but that, for the purpose of the investigation, and to prevent any inconvenience resulting from the divisions between the parties, until the Court arrived at the proper period for decision, these orders were made, in order to keep peace between them; and that, in the meantime, the Court would not determine anything inconsistent (if I may so say) with the *status quo*, until it had heard fully both parties, and received the evidence. Under these circumstances, the very most that could be made of the orders would be, that they furnished evidence—certainly merely evidence—of the fact existing at the time; namely, that both parties claimed the ferry; but that is not the principle on which such orders can be received in evidence. The opinion of this Court is, that in the cases where reputation is evidence—that is, cases involving a general right, in which all the Queen's subjects are concerned—a verdict or a judgment, upon the matter directly in issue between the parties—although between other parties—is also evidence; not, however, that it is evidence of any *specific fact existing at the time*, but that it is evidence of the most solemn kind, of an adjudication of a competent tribunal upon the state of facts, and the question of usage at that time. But we shall greatly extend the rule of law, and most probably introduce great uncertainty in the mode of receiving or rejecting testimony of this sort, if we apply it to an interlocutory order of this nature, not involving any judgment upon the rights of the parties. It is clear, that the answer alone can in no sense be evidence. Therefore, as we think

these orders were improperly received in evidence, there must be a new trial on that ground.

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PARKE, B.—The order itself affirms no proposition of fact; it does not affirm any ferry from Birkenhead to Liverpool.

ALDERSON, B.—It seems to me that the order amounts to no more than to direct the continuance, during the suit, of a certain state of things which existed at the time the order was made, without passing any judgment upon the facts, or on the rights of the parties. It appears to me to affirm nothing at all.

MAULE, B., concurred.

Rule absolute for a new trial.

The cause was tried again at the Chester Summer Assizes, 1839, before *Patteson*, J. The evidence was substantially the same as on the first trial, except that the plaintiffs did not put in the proceedings which had been held by the Court to be inadmissible, nor the proceedings in quo warranto of the 27 Edw. 3; and that the defendants gave in evidence several documents which shewed that, at the date of the letters patent of 4 Edw. 3, the ferry which had vested in the Crown on its forfeiture by Robert de Ferrers, was outstanding in the hands of a subject (a).

The *Attorney-General*, in the course of his reply for the plaintiffs, contended that there was no evidence of the identity of the ferry mentioned in those documents with the ferry the existence of which was recited in the grant of Edw. 3, and that it did not appear, from any of the documents relating

(a) The plaintiffs did not put in evidence the early documents relating to the Liverpool ferry, which they read on the former trial: but they were proved by the defendants.

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to it, that its terminus was in Birkenhead. The learned Judge, in summing up, left it as a question to be decided by the jury, whether the ferry recited in the grant was identical with that mentioned in the various documents put in by the defendants; having expressed his opinion, that if, at the time of the grant, there was an existing ferry from Liverpool to Birkenhead, and back again, which was then in the hands of a subject, the grant of another ferry within the same limits would be void. A bill of exceptions to the direction of the learned Judge, on several grounds, (including those taken at the former trial), was tendered by the defendants' counsel. The jury having again found for the plaintiffs,

Wilde, Serjt., in Michaelmas Term, moved for a new trial, on two grounds: first, that it having been assumed throughout the trial, as an admitted fact, that the ferry recited in the grant of Edw. 3 was the same as that mentioned in the various documents relating to the Lancashire or Liverpool ferry, and no point having been made on this question until the reply, the learned Judge ought not to have left that as a question to the jury; or at all events, that the verdict, as to this point, was contrary to the evidence: secondly, that under the description of the Woodside Ferry, in the lease to the plaintiffs, which stated it as a ferry *both ways*, a ferry from Birkenhead to Liverpool only would not pass.

LORD ABINGER, C. B.—We cannot say there is any misdirection upon the evidence in the cause. If the question as to the identity of the ferries arose at all, it was right to leave it to the jury. We cannot grant a rule on the ground that the verdict was against the evidence, without consulting the learned Judge. As to the last point, the construction of the lease, we reserve our judgment upon it until we see the precise terms of the lease.

On a subsequent day,

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PARKE, B., said—We have conferred with my Brother *Patteson*, and he informs us that the question was left to the jury as to the identity of the ferries, and that he is not dissatisfied with their verdict. There will therefore be no rule on that ground. As to the other point, we have had an opportunity of looking at the terms of the lease, and we think it cannot be construed so strictly as that a ferry one way only could not pass under it. There is no authority to shew that a right of ferry one way may not pass under a conveyance of a ferry both ways. There will therefore be no rule.

Rule refused.

The bill of exceptions was subsequently abandoned by the defendants.

VACATION SITTINGS AFTER HILARY TERM.

EYRE v. SHELLEY.

ASSUMPSIT for work and labour as an attorney, for money paid, and on an account stated. Plea, as to the sum of 426*l.* 4*s.* 10*d.*, parcel &c., that that sum was claimed by the plaintiff to be due to him for work and labour, as attorney for the defendant, in bringing and defending certain actions in the Court of Queen's Bench, and materials provided in and about that work and labour, and for fees due and payable to the plaintiff in respect thereof, done before the 16th day of November, 1833; and

An attorney may recover his fees for business done between the 16th of November and the first day of Hilary Term, although, when the business was done, he had not entered his certificate pursuant to the stat. 37 Geo. 3, c. 90, s. 27.

To an action for work and labour as an attorney, the defendant pleaded, that although, during the time when the work was done, the plaintiff was an attorney duly admitted and enrolled, he had not, during any part of that time, obtained or entered the certificate required by law, authorizing him to practice as an attorney during any part of the said time, pursuant to the statute; and the plaintiff during all that time wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never had obtained or entered the same:—*Held*, that this plea was bad on special demurrer, for duplicity.

Scandal, that it was also bad on special demurrer, for describing the certificate, not in the terms of the statute, but by words involving its legal operation and effect.

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that although, during the time when the said work and labour was so done as aforesaid, &c., the plaintiff was an attorney of the said Court of Queen's Bench, duly admitted and enrolled, yet he had not, during any part of the time when the said work and labour was done or in progress, *obtained or entered* the certificate required by law in that behalf, authorizing him the plaintiff to practise as such attorney during any part of the said time, pursuant to the statute in such case made and provided; and the plaintiff during all that time wrongfully and wilfully neglected and omitted to take out and obtain, and was without, such certificate, and never had obtained or entered the same, contrary to the statute, &c.—Verification.

Replication, that before and during all the time in the plea mentioned, the plaintiff *had duly obtained* the certificate required by law in that behalf, authorizing him the plaintiff to practise as such attorney, during the whole of the said time, pursuant to the statute, &c.

Special demurrer, on the ground that the replication stated only that the certificate had been *obtained* by the plaintiff, and took no notice of the allegation in the plea that it had not been duly *entered*. Joinder in demurrer.

The case was argued in Hilary Term by

Petersdorff in support of the demurrer.—The replication is bad on the ground suggested. The stat. 37 Geo. 3, c. 90, s. 27, prescribes that "every certificate, so to be obtained as aforesaid, shall be entered in one of the Courts, in which the person described therein shall be admitted, &c., within the time thereinbefore prescribed, or before such person shall be permitted to practise as an attorney." And s. 30 enacts, that "if any person shall in his own name, or in the name of any other person or persons, sue out any writ or process, or commence and prosecute, carry on, or defend any action or suit, &c., without obtaining a certificate in the manner thereinbefore directed, *or without entering the same* in one

of the Courts aforesaid," &c., he shall forfeit the sum of £50, and is thereby made incapable to maintain any action for any fee, &c., "on account of prosecuting, carrying on, or defending any action, suit, or proceedings, &c., without *such certificate as aforesaid*." Both the *obtaining* and the *entering* the certificate are therefore necessary, in order to enable the party to practise as an attorney, or to recover his fees as such. The plea accordingly alleges that the plaintiff did not comply with either of these two requisites; but the replication only alleges that he did not *obtain* the certificate. [Parke, B.—Is not the plea bad, as alleging only that the plaintiff had not obtained or entered a certificate, "authorizing him to practise as an attorney?" There is no provision in the statute making a certificate necessary for that purpose; the only effect of not obtaining it is to subject the party to a penalty, and to disable him from maintaining an action for his fees.] These words in the plea must be taken, not as referring to the general right of the plaintiff to practise as an attorney, but as descriptive of the instrument which is necessary to enable him to maintain an action for his fees. But if not, the words are mere surplusage, and may be rejected; and if it be alleged that they present an ambiguity, or render the plea liable to the objection of duplicity, that should have been made a ground of special demurrer.

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Peacock, contra.—The replication is good. The allegation in the plea that the certificate had not been *entered*, is altogether immaterial, and it was therefore unnecessary to notice it in the replication. The only effect of not entering the certificate is to subject the attorney to a penalty of £50, but that omission does not prevent him from suing for his fees. [Parke, B.—The statute expressly enacts that if he shall carry on any action or suit, &c., without obtaining a certificate, or *without entering the same*, he shall forfeit £50; and that he shall be incapable of main-

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taining any action for his fees on account of proceedings carried on by him without "such certificate as aforesaid," i. e. such certificate so obtained and so entered. The plea is clearly double, because it contains two distinct defences, viz. that the plaintiff either has not obtained his certificate at all, or, if he has, that it has not been entered pursuant to the statute: but it is not objected to on that ground.] At all events, *Bowler v. Brown (a)* is an express authority, that in order to render the attorney liable to the disability imposed by the statute, the omission to enter his certificate was wilful, with an intent to evade the higher duties imposed by the stamp act. The plea ought, therefore, to have alleged that the plaintiff *wrongfully and wilfully* had neglected and omitted to *enter* the certificate. If the construction were otherwise, every country attorney whose certificate had not been taken out through the neglect of his town agent, would be rendered incapable of recovering his costs, and also be liable to a penalty of £50. [*Parke, B.*—The Court of King's Bench decided that case on the supposition that the words in the 30th section, "with intent to evade the payment of the higher duties by the said act imposed," overrode the whole clause; but I cannot help thinking the decision very doubtful.] Then, the plea is bad in substance, and therefore on general demurrer, on the ground already suggested, viz. that there is no such thing as a certificate authorizing an attorney to practise. Moreover, it tenders an issue of law instead of fact, viz. that the plaintiff has not obtained or entered the certificate *required by law*: thereby referring it to the jury to ascertain what is a sufficient certificate in point of law. On this point he cited *Ashby v. Harris (b)*, and *Lloyd v. Wood (c)*. [*Parke, B.*—In declaring as reversioner, it is not necessary to state what his reversion is, though the

(a) 2 Ad. & E. 116; 4 Nev. & M. 17; 3 Dowl. P. C. 80.

(b) 2 M. & W. 673.

(c) 5 Ad. & E. 228.

nature and existence of the reversion would frequently involve difficult questions of law.]

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Petersdorff, in reply.—The case of *Bowler v. Brown* is virtually overruled by *Wilton v. Chambers* (a). If there be anything in the objection that the plea is bad, as involving matter of law, it should have been taken on special demurrer, as in *Ashby v. Harris*. In *Lloyd v. Wood*, the declaration was bad in substance, as disclosing no cause of action.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—The declaration in this case was for work and labour as an attorney. There was a plea, as to 42*l.* 4*s.* 10*d.*, parcel of the money mentioned in the declaration, that such a sum was claimed to be due to the plaintiff for costs as an attorney, in prosecuting suits in the King's Bench done before the 16th of November, 1838: and that although the plaintiff was an attorney of that Court, duly admitted and enrolled, yet he had not, during any part of the time when the work was done or in progress, *obtained or entered* the certificate required by law, authorising him to practise as such attorney, during any part of that time, pursuant to the statute; and the plaintiff during all that time wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never hath obtained or entered the same, contrary to the form of the statute.

The plaintiff replies, that, before and during all the time in the plea mentioned, he had duly obtained the certificate required by law in that behalf, authorizing the plaintiff to practise as such attorney.

(a) 7 Ad. & E. 524; 2 Nev. & P. 392.

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To this replication there is a special demurrer, assigning for cause, that the replication does not state that the certificate had been entered.

The plea would undoubtedly be bad for duplicity, on special demurrer, but it is cured by pleading over. Probably it would have been bad on special demurrer, and we are inclined to think on special demurrer only, for describing the certificate, not in the terms of the act of Parliament, but by words involving its legal effect and operation.

The replication also would be bad, without doubt, if it answered only one of two grounds of defence, both available, contained in the plea. It does answer *one*, namely, the practising without a certificate; it does not answer the other, namely, the practising without having entered that certificate, according to the provisions of the statute; and the question in the case is, whether the omission to enter a certificate is an answer to an action for business done *at any time* during the year to which the certificate applies.

Upon the pleadings, we must assume, that if the business was done in one year, between the 15th of November and the 15th of November, there was a certificate duly obtained, but never entered; if in two or more years, there were two or more certificates, but each omitted to be entered; and the question is, whether the omission to enter a certificate deprives the plaintiff of his remedy by action for business done *in every part* of the year. If there be a part of the year during which the attorney might do business in the conduct of suits lawfully, so as to make a legal contract for payment of his services, without having entered his certificate, the plea is bad in substance, so far as it relates to the not entering the certificate, inasmuch as it does not aver that the business was not done in that part of the year, or years, embraced in the general terms of the declaration.

And, upon a careful review of the statutes on this subject, which raise a question of some nicety, we think it

was not illegal in this sense for a certificated attorney to carry on a suit between the 15th of November and the 1st day of Hilary Term in any year, without having entered his certificate, though he would have been liable to a penalty, if, after having so carried it on during a part, he did not enter his certificate before the expiration of that interval.

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The first statute requiring a certificate was the 25 Geo. 3, c. 80, which enacts, "that every attorney admitted or enrolled in the King's Courts at Westminster shall, previous to his prosecuting or defending any suit, have a certificate of his admission or enrolment, upon which a stamp duty is to be charged. In order to obtain it, he is to deliver a written paper, stating his place of residence, to the proper officer named in the 4th section of the statute, which written paper is to be duly stamped, according to his place of residence, and the officer is to enter the name &c. of each attorney producing such paper, and to subscribe to such paper a certificate that such attorney is duly enrolled. These certificates are to remain in force from the 1st of November to the 1st of November, and be renewed ten days before they expire. By section 7, any one who shall sue out any writ, or prosecute or defend any action for reward, without having obtained such certificate, shall forfeit £50, and is disabled from suing for any fee or reward for prosecuting or defending such actions.

Under this statute, the entry was of the name and residence, and preceded the certificate; and all practice without a certificate was not merely subject to a penalty, but no remuneration could be recovered for it.

The 37 Geo. 3, c. 90, s. 26, completely changes the machinery for obtaining the stamp, and requires the certificate to denote the fact of payment of the duties, and not of enrolment, and to be given by the commissioners of stamps; and, after it has been obtained, makes it necessary that it shall be entered with the officer of the Court

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mentioned in the 25 Geo. 3. The time for taking it out is varied. It is provided, that every attorney admitted and enrolled shall annually, between the 1st of November and the end of Michaelmas Term then next following, during such time *as he shall continue to practise*, or before such person shall commence to prosecute or defend any action or suit, obtain a certificate to denote the payment of duties. The certificate to be issued between those dates is to bear date on the 2nd of November, and at every other time, on the day when it is issued, and is to determine on the 1st of November. Those days are afterwards, by the 54 Geo. 3, c. 144, altered to the 15th of November and 16th of December.

The 27th section provides, that every certificate shall be entered within the time thereinbefore prescribed, (*viz.* between the 1st of November and the end of Michaelmas Term), *or* before such person shall be permitted to practise; and by the statute 44 Geo. 3, c. 59, s. 3, this part of the 37 Geo. 3 is repealed, and it is provided that any person who is by that act (37 Geo. 3) required to obtain such certificate in any year after the 1st day of November, may enter the same at any time before the commencement of Hilary Term then next following; and the certificate so entered shall be as valid as if it had been entered within the former time.

The 30th section imposes the penalties for non-compliance with the previous enactments. If any one shall prosecute or defend, without obtaining a certificate, or without entering the same, he shall forfeit £50, and is made incapable of maintaining any action or suit for fees, &c., for prosecuting or defending any suit, *without such certificate as aforesaid*.

The question in the case depends upon the construction of these clauses, the 30th and 27th.

The 30th does not use the terms "without having entered his certificate, or without such certificate so entered

as aforesaid:” it prohibits the suit for fees only, if there is no *certificate*. It does not use the language of the 25 Geo. 3, “without having *obtained* a certificate,” and probably for this reason, that, under that statute, the certificate was required to be obtained before any business was done. Under this, the business may be done between the 1st November and the end of Michaelmas Term, and the certificate antedated so as to render it legal; but it seems that unless there be a certificate obtained before, or so antedated, the action could not be maintained, in respect even of business done in that interval. It appears to us that this prohibitory clause applies to the *want of certificate only*.

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Is the practice then rendered illegal by the 27th section, so as to disable the attorney from suing for it? Every practising which is prohibited by penalty at the time it takes place, is illegal; but that which is not prohibited at the time it takes place, is not; though the attorney be liable to a penalty for a subsequent neglect or omission.

The 27th section inflicts the penalty upon an attorney for not entering; which must be either “within the time aforesaid,” (that is, now, between the 1st of November and the 1st day of Hilary Term), or before such attorney shall be permitted to practise. Now, in all cases falling within the second branch of this alternative, by which the practice is prohibited, unless there be, not only a certificate, but an entry thereof, before it takes place, it is clear that the practice is unlawful without entry, and no action will lie to recover a compensation for it; but in the cases falling within the first branch, it appears that it is enough to make the entry before the end of the limited time. In the meantime, the practice is lawful; a contract to pay the price is lawful; the price may be sued for the instant it is due, and the want of the subsequent entry cannot render it illegal by relation; but if, at the end of the prescribed time for entry, there is no entry, then the attorney

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is liable to a penalty. It appears to us, that the business done between the 15th of November and the 1st day of Hilary Term falls within the latter alternative; any business done at any other time of the year, within the former: and the plea is bad, as it does not shew that the business was of that description; for it is consistent with every averment in the plea, that the business was done between the 15th of November and the 1st day of Hilary Term, in one or more years.

As this is a sufficient ground for our judgment, we do not think it necessary to advert to another objection made to the plea, founded on the case of *Bowler v. Brown*; namely, that though the omission to take out the certificate is averred to be wilful, it is not averred that the omission to enter it was so; nor do we give any opinion as to the authority of that case.

Our judgment must, for the reasons before given, be for the plaintiff.

Judgment for the plaintiff.

TRICKEY v. LARNE.

Plea, to an action by drawer against an acceptor of a bill of exchange for 20*l.* 8*s.* 6*d.*, that before the drawing and acceptance of the bill, it was agreed between the plaintiff and defendant that the plaintiff

ASSUMPSIT by drawer against acceptor of a bill of exchange for 20*l.* 8*s.* 6*d.*, with a count on an account stated. Plea to the 1st count, that before the drawing and accepting of the said bill of exchange in the declaration mentioned, it was agreed between the plaintiff and the defendant, that the plaintiff should do for the defendant certain carpenter's and joiner's work, in a workmanlike manner,

should do certain carpenter's work for the defendant for £63; that the defendant paid the plaintiff £43 in part payment of the £63, and afterwards accepted the bill of exchange, on account of the residue of the £63; that the plaintiff did not perform his agreement, but neglected to perform some work, and performed in an unworkmanlike manner other work, necessary to be done under the agreement; and that the £43 was more than the whole work done was worth:—*Held* bad, on motion for judgment non obstante veredicto, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment and the bill were alike applicable.

for the sum of £63; that the defendant afterwards, to wit, on the 14th day of March, 1839, paid to the plaintiff the sum of £43, in part payment of the said sum of £63; that the plaintiff, on the 22nd day of May, 1839, drew the bill of exchange in the first count mentioned, and the defendant accepted the same, on account of the residue of the said sum of £63; that the plaintiff did not perform his said agreement, but wholly neglected and refused to perform certain works which were necessary to be done under the said agreement, and performed other works which were necessary to be done under the said agreement in a bad and unworkmanlike manner, so as to be of little or no use to the defendant; that the said sum of £43, so paid by the defendant to the plaintiff for the said work, was much more than the whole work done by the plaintiff was worth; and that the said bill of exchange was drawn and accepted in manner and under the circumstances in this plea mentioned, and in respect of which there was such want and failure of consideration as aforesaid, and for and in respect of no other monies or debts whatsoever. Plea to the second count, non assumpsit.

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Replication to the first plea, de injuriâ.

At the trial before *Rolfe*, B., at the Middlesexittings in Michaelmas Term, the jury found a verdict for the defendant. *Crowder* having obtained a rule to shew cause why the judgment should not be entered for the plaintiff, non obstante veredicto, on the first issue,

Busby now shewed cause.—This plea discloses a sufficient defence to the action, at least on general demurrer or after verdict. It shews a total failure of consideration as to the bill of exchange. [*Parke*, B.—Why more as to the bill than the other part of the £63? You do not allege that the £43 was paid for work done, and that the bill was given for the residue to be done, and that it was not done. It is one entire contract, and the plea shews

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only a partial failure of consideration for the bill *and* the money payment.] The plea alleges that the bill was given for the residue of the £63, and that the work done was worth only the £43 previously paid. Suppose the bill had never been given nor the money paid, the defendant would clearly have had a right, in answer to an action for the price of the work, to say it was worth only so much, and that in respect of the remainder the contract could not be enforced. [*Parke, B.*—No doubt; but this is one entire sum paid, partly in money, partly in a bill, upon one contract, and there is only a partial failure of consideration upon that contract.] By the contract the defendant was not bound to pay anything until the whole work was done in a workmanlike manner: therefore, as the plaintiff thought fit to receive the £43 while the work was in progress, and the jury have found that that sum covered all he was entitled to, he ought not to be allowed to recover also on the bill.

PARKE, B.—It ultimately turns out that the plaintiff is entitled to £43 only; but that does not shew a total failure of consideration; and the defendant cannot succeed, unless he shews that the consideration for the bill has totally failed. The defendant should have stipulated, when he gave the bill, that it was not to be paid unless work was done to a greater value than the £43. The £43 had been paid when the bill was given, but the plea does not aver that it was given for the balance of the account beyond the £43. The defendant is in the same position as if payment had been made for the whole work by a bill for £63; in that case there would not have been a total failure of consideration; so here, he chooses to pay down, in money and a bill together, the price for work contracted to be done: then the work being defectively done, there is a partial failure of the consideration to which the bill is in part applicable as well as the money, not a total failure of consideration on the bill.

ALDERSON, B.—The bill and money are given for work contracted to be done, which ultimately turns out to be worth only £43. It is clearly a partial failure of consideration as to the whole payment, and drives the defendant to his cross action.

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GURNEY, B., concurred.

Rule absolute.

Crowder and Whitmore were in support of the rule.

ARMFIELD v. BURGIN and Another.

DECLARATION in debt, containing three counts: the first on a bill of exchange drawn by the plaintiff, and accepted by the defendants for the sum of 33*l.* 3*s.* 9*d.*; the second for £70, for goods sold and delivered; and the third for £70 due on an account stated. The declaration demanded, in the usual way, the sum of 173*l.* 3*s.* 9*d.* Particulars of demand were delivered, which gave credit for £20.

To a declaration in debt, containing a count upon a bill of exchange for 33*l.* 3*s.* 9*d.*, with counts for goods sold, and upon an account stated, each in the sum of £70, and demanding in the usual form the sum of 173*l.* 3*s.* 9*d.*, the defendants pleaded, except as to £20, parcel of the sum of 173*l.* 3*s.* 9*d.* in the declaration demanded, and for the payment of which said sum of £20 the plaintiff has given the defendant credit in his particulars of demand, actionem non,

The defendants pleaded, except as to the sum of £20, parcel of the said sum of 173*l.* 3*s.* 9*d.* in the said declaration demanded, for the payment of which said sum of £20, parcel as aforesaid, the plaintiff has given the defendants credit in his particulars of demand delivered in this action, the defendants say that the plaintiff ought not further to maintain his action, because the defendants now bring into Court the sum of 13*l.* 12*s.* ready to be paid to the plaintiff, and the defendants further say that they never were indebted to the plaintiff to a greater amount than

because the defendants now bring into Court the sum of 13*l.* 12*s.* ready to be paid to the plaintiff, and they further say that they were never indebted to the plaintiff to a greater amount than the said sum of 13*l.* 12*s.* in the introductory part of this plea mentioned:—*Held*, that the plea was bad on special demurrer; that it ought to have shewn some answer as to part, and pleaded payment into Court as to the residue.

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1840. introductory part of this plea mentioned.—Verification. .

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Special demurrer, assigning for causes, that the plea purports to answer the whole declaration, and is in fact an answer to part only, and that the plea is a plea of payment into Court of the sum of 13*l.* 12*s.* in satisfaction of all the debts and causes of action in the declaration mentioned, except £20 parcel thereof; whereas such debts together amount to 173*l.* 3*s.* 9*d.*, and, after deducting therefrom the said sum of £20, are a much larger sum than the said sum paid into Court, and the whole of such debts and causes of action should have been pleaded to.

Ogle, in support of the demurrer.—The plea is bad, inasmuch as it does not answer the whole of the declaration. Besides, it is bad as pleading the payment into Court of a smaller sum than the amount of the bill of exchange, and the sums mentioned in the other counts. As the plea stands, it is applicable to all the counts. [He was then stopped by the Court.]

Fortescue, in support of the plea.—If the first objection was ever available at all, it cannot be taken advantage of now. The proper course was for the plaintiff to sign judgment for so much as was unanswered by the plea. Upon this record, the plea must stand upon its validity as a plea pleaded to a part only of the sum demanded in the declaration. The other objection to the mode of pleading is not assigned as a cause of demurrer. [*Parke*, B.—By the new rules (*a*), never indebted is no plea where the action is on a bill of exchange—is not that a ground of objection on general demurrer?] It is a fallacy to suppose that this is a compound plea, consisting of distinct averments of a payment into Court, and that the defendant was never

(a) Reg. Gen. H. T., 4 Will. 4, tit. Covenant, and Debt.

indebted as to the residue. It is a distinct plea, and is in the form given by the late rules of pleading, and by those rules declared to be applicable, and directed to be used in all cases where money is paid into Court. This is evident from the old form of plea which was first given, and which concluded with *nil debet* instead of *never indebted*, and that form was made applicable to all cases in which money was paid into Court, though by a former rule *nil debet* was declared to be no plea *in any case*. With regard to this plea being good on general demurrer, *Finlayson v. M'Kenzie* (a) is an authority. There the Court of Common Pleas held that the old form of a plea of payment into Court as applied to a bill of exchange, was good on general demurrer, though bad on special demurrer. In deciding the latter point, however, the attention of the Court was not directed to the fact, that the plea of *nil debet* was equally prohibited as applied to the common counts, as to a count on a bill of exchange. [*Alderson, B.*—Does not the difficulty arise from the altered form of the plea of payment into Court? I can understand that it might apply to a bill of exchange, as long as the form of *nil debet* was retained; but how can you say you were *never* indebted? Does not the bill constitute a debt?] The bill is only *primâ facie* evidence of a debt. Before the new rules of pleading, a payment into Court upon a bill of exchange admitted only the making of the contract *in fact*, and a right to recover to the amount paid in; but every other defence was open. *Reid v. Dickons* (b), *Cox v. Parry* (c). It is therefore submitted, that this plea is good in form as well as in substance; for the latter, *Finlayson v. M'Kenzie* is a clear authority. In *Marshall v. Whiteside* (d), *Parke, B.*, in giving judgment, after referring to *Jourdain v. Johnson* (e), speaks of it as deciding, that “where there is a plea of

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(a) 3 Bing. N. C. 824; 5 Scott, 20; (c) 1 T. R. 464.

6 Dowl. 71.

(d) 1 M. & W. 192.

(b) 5 B. & Ad. 499; 2 N. & M. 369. (e) 2 C., M., & R. 564.

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payment of money into Court, it need not be pleaded to each count, but may be pleaded generally to the whole declaration." Then, as to the amount claimed under the money counts, *Kingham v. Robins* (a) is an authority that the plea of payment into Court under those counts only admits a liability upon some one or more contracts, to the extent of the sum paid in. Here the amount paid into Court, together with the £20 for which credit is given in the particulars, which are referred to in the introductory part of the plea, exceeds the amount of the bill of exchange, and it might be that nothing at all was due on the common counts. If this plea should be held bad on the ground alluded to, it will be impossible hereafter to pay money into Court at all to a count in debt on a bill of exchange, for the plea must contain the concluding averment of *nunquam indebitatus*. [*Parke, B.*—If the full amount were paid into Court, that averment would be surplusage.] It would not be so in all cases, as, for instance, where money is paid into Court on a bill or note payable a certain time after demand with interest, where the amount of interest and principal is usually alleged under a *videlicet*, and is not material.

Ogle, in reply.—This plea does not follow the new form of the plea of payment of money into Court, in this, that it is not pleaded as to part. The objection to the plea is a matter of substance, and renders it a nullity.

PARKE, B.—The plea is clearly bad on special demurrer, but in the special causes assigned the defect is not pointed out; which is, that the plea of never indebted is improper to so much of the demand as consists of the promissory note. You had better amend without costs on both sides. It is clear that you cannot plead *nunquam indebitatus* to a count upon a bill of exchange. Where, in an action of debt on a bill of exchange, a sum of money is

(a) 5 M. & W. 94.

paid into Court less than the amount of the bill, the defendant should shew some answer as to part, and plead the payment into Court as to the residue, in which case the concluding averment in the plea of never indebted would become surplusage.

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Leave to amend.

EDMONDS v. LAWLEY.

TROVER against the sheriff of Warwickshire for converting the plaintiff's goods.

Pleas, first, that the plaintiff was not possessed; secondly, that one George Jackson was, at the time of issuing the fiat in bankruptcy thereafter mentioned, a trader, &c., and, as such trader, had, on the 1st of April, 1839, become indebted &c., and thereupon to wit, on the 6th of July, became and was a bankrupt; that afterwards, and before the committing of the grievances, to wit, on the 7th of July, Henry Bosanquet and others sued out of the Court of Queen's Bench a writ of *fieri facias* against the said George Jackson, directed &c. and indorsed, to levy, &c.; under and by virtue of which writ, after the bankruptcy and before the issuing of the fiat as thereafter mentioned, to wit, on the 8th of July, the defendant, as sheriff as aforesaid, seized and took in execution the said goods and chattels for the purpose of levying &c., and did afterwards by sale thereof levy &c.; that the said goods and chattels were at the time of the bankruptcy the property of the said George Jackson, and liable to be taken &c.; that afterwards, to wit, on the 24th of July, on the petition of C. G., the Lord High Chancellor issued his fiat, directed to certain persons thereby nominated and appointed commissioners, &c.; by whom the said George Jackson was adjudged a bankrupt &c.: that notice was published in the *Gazette*, and at a meeting

An act of bankruptcy having been committed on the 6th of July, a *bonâ fide* execution was issued on the 8th, under which the goods of the bankrupt were levied. On the 19th of July the 2 & 3 Vict. c. 29, was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees:—*Held*, that the execution was protected by the statute.

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duly holden at &c., the plaintiffs were chosen and became assignees, and entitled as such to the possession of the said goods and chattels, which possession is the same mentioned in the declaration. The plea then averred that the writ was bonâ fide executed and levied by the defendant, as sheriff, before the date and issuing of the fiat; that the said Henry Bosanquet and others had not, nor had the defendant, notice of any prior act of bankruptcy committed by the said George Jackson; and that the judgment upon which the said writ was issued, was not founded on a warrant of attorney or cognovit, given by the said George Jackson by way of a fraudulent preference to any creditor.—Verification.

To the second plea the plaintiff replied, that the defendant, as such sheriff as aforesaid, seized and took the said goods and chattels in the declaration and the second plea mentioned, after the said George Jackson had become a bankrupt as aforesaid, and before the passing of the statute 2 & 3 Vict. c. 29.—Verification.

Rejoinder—That the fiat in bankruptcy was not made and issued until after the passing of the 2 & 3 Vict. c. 29.

Special demurrer, on the ground that the statute 2 & 3 Vict. c. 29, is not retrospective, and that the execution having been levied after an act of bankruptcy, and before the passing of that statute, is not protected by it, though the fiat was dated and issued after it came into operation.

Wightman, in support of the demurrer.—The question in this case depends upon the construction of the recent statute 2 & 3 Vict. c. 29, and whether that act is to have a retrospective operation or not. The first section enacts, “that all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide exe-

cuted or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed;" and it then goes on to provide, that the act shall not apply to protect any fraudulent preference, &c. Now here the plea states that the execution was levied on the 8th of July, after the act of bankruptcy had been committed, but before the fiat, which was issued on the 24th. The act was passed on the 19th, and so came in intermediately between the execution and the fiat. The act has no retrospective operation; and as soon as the fiat was issued, and the assignees were chosen, they were, by the retrospective operation of the bankrupt laws, placed in the same situation as if the fiat had been issued, and the assignees chosen, at the time when the cause of action accrued. It is on that ground that a sheriff, who has taken the goods of a bankrupt in execution, has been held liable in trover, under circumstances which otherwise would have excused him: *Potter v. Starkie* (a), *Price v. Helyar* (b), *Balme v. Hutton* (c), *Garland v. Carlisle* (d). The Courts have admitted the hardship upon the sheriff; but they felt themselves bound to give effect to the retrospective power of the bankrupt law. If this act had not passed, the assignees would clearly have been entitled to the goods, on the ground that, when they were seized by the sheriff, there was a vested right in them by relation back to the act of bankruptcy, and the act cannot be construed to have a retro-

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(a) 4 M. & Sel. 459.

(b) 1 M. & P. 541; 4 Bing. 597.

(c) 1 C. & M. 262.

(d) 2 C. & M. 31.

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spective operation, so as to deprive them of that right. This case may be illustrated by reference to a decision upon the 4th section of the Statute of Frauds, by which it is enacted, that "no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless there be some note or memorandum thereof in writing;" and in *Gilmore v. Shuter (a)*, where there was a verbal promise of marriage before the passing of that act, it was held that an action might be maintained upon it after the act came into operation, on the ground that the act had no retrospective operation, and could not extend to a parol agreement made previously to the passing of the act; that as the cause of action was vested before the act passed, the act could not have a retroactive operation to take away the right so vested. Here there was a vested right before the act came into operation, and it cannot have the effect of taking away the right so vested. The words of the act are, "all executions, &c., bonâ fide executed or levied before the date and issuing of the fiat;" there is nothing to shew that it was intended to relate to prior executions, or to affect the operation of the bankrupt laws. It clearly means *future* executions, and *future* contracts. Lord *Coke* says, "it is a rule and law of Parliament, that nova constitutio futuris formam imponere debet, non præteritis (b)." [*Parke, B.*—You say we must not construe this act so as to defeat any vested right; but in whom was there any vested right, or who had any vested right to these goods at the time the act passed, except the bankrupt, subject to the rights of the creditors? I agree that we ought not to construe general words so as to affect vested interests; but in whom was there any vested interest in this case at the time the act passed?] Admitting that there was no vested interest in

(a) 2 Lev. 227; 2 Show. 16; 2 Jones, 108.
Mod. 10; 1 Vent. 330; 2 Sir T. (b) 2 Inst. 292.

the assignees at the time the sheriff seized, as soon as the fiat was issued, and the assignees were chosen, their right reverted back to the time of the seizure by the operation of the bankrupt laws, and a cause of action then accrued. [Parke, B.—That argument would have been well founded, if the act had been prospective: but if it had been so, the words would have been, “all executions and attachments *hereafter to be* executed or levied.”] Suppose the fiat had issued two days before the act passed, and before assignees were chosen, unless the Court hold the act to be prospective, an execution creditor would be protected by it; inasmuch as, no assignees having been chosen, there would be nothing but an inchoate right at the time.

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Shee, contra, was stopped by the Court.

PARKE, B.—The question in this case turns upon the construction of the 2 & 3 Vict. c. 29, s. 1. The words of the act are very general, none of them future, and if taken according to their grammatical construction, will apply to all contracts, either bygone or future. The sound rule of construction with respect to acts of Parliament is, that the words are to be read in their ordinary and usual grammatical sense, unless that mode of construction leads to manifest inconvenience, or is repugnant to the plain intention of the legislature. If such construction would have the effect of defeating any antecedent vested right, we ought to construe the act so as to support and not to defeat it. If, in this case, a fiat had issued, and assignees had been appointed before the passing of the act, they would have had a vested right to the property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right. Perhaps, if the assignees had not been appointed when the act passed, but the fiat had issued before, we should in that case also construe it so as not to defeat

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the right of the assignees. But with respect to all fiats issued after the new act has come into operation, we think there is no injustice in saying, that the assignees must take the property subject to the new law. The defendant, therefore, is entitled to judgment.

ALDERSON, B.—I am of the same opinion. At the time that the act passed, the state of things was this—an act of bankruptcy had been committed, upon which a fiat might at some future period be taken out, but none had then been issued; intermediately a bonâ fide execution had been levied. Under the old law the creditor would have had the property to satisfy his debt, subject to its being divested in case a fiat issued, overriding his execution, within two months. The legislature seem to have thought that that was not a very just position for the creditor to be placed in, and they say that that shall not take place in future. I think that by thus construing the act, we give it a prospective and not a retrospective operation.

GURNEY, B.—I entirely concur with the rest of the Court. By putting this construction on the act, we carry out the remedy intended by it, without doing any injustice.

ROLFE, B.—I agree with the rest of the Court. What has been said by my Brother *Alderson* solves the difficulty; we do not by this construction give the act a retrospective but a prospective effect, for the title of the assignees was incomplete at the time it passed. The argument urged applies to cases where all the acts had been done which were necessary to vest the property in the assignees.

Judgment for the defendant.

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GALWAY v. ROSE.

ASSUMPSIT.—The declaration stated that the defendant, on the 21st of November, 1835, in parts beyond the seas, to wit, at Cahir, in Ireland, made his bill of exchange in writing, and directed the same to certain persons by and under the name, style, and description of Messrs. Arint & Borough, Dublin, and thereby requested the said Messrs. Arint & Borough to pay to one Captain Bushe or his order £397, three months after the date thereof, which period had elapsed before the commencement of the suit. The declaration then alleged that the said Captain Bushe then indorsed the said bill to the plaintiff: that it was presented to the said Messrs. Arint & Borough for acceptance, but that they refused to accept the same, whereupon the said bill was duly protested for non-acceptance, whereof the defendant had due notice; and the said plaintiff further says, that the said bill being wholly unaccepted and unpaid, afterwards, and on the day when it became due, to wit, on the 24th of February, 1836, the said bill was presented to the said Messrs. Arint & Borough for payment, but that they would not pay the same when so presented to them, but wholly declined and refused, whereupon the said bill was duly protested for non-payment, of all of which said last-mentioned premises the defendant had notice: and whereas also the defendant before the commencement of this suit, to wit, on the 8th of January, 1839, was indebted to the plaintiff in £600 on an account stated; and the defendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to

Assumpsit.—The declaration stated that on &c., the defendant made his bill of exchange, and directed the same to A. & Co., payable to B. or his order, three months after date, which period had elapsed before the commencement of the suit; that B. then indorsed it to the plaintiff; that it was presented for acceptance and protested for non-acceptance, of which the defendant had notice; that the bill being wholly unaccepted and unpaid, afterwards &c., when it became due on &c., was presented for payment to A. & Co., who refused to pay the same, whereupon it was protested for non-payment, of all which the defendant had notice. And whereas also the said defendant before &c., to wit, on &c., was indebted to the plaintiff

&c., on an account stated; and the defendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several sums respectively on request. To this declaration there was a demurrer for duplicity and uncertainty:—*Held*, that whether the first part of the declaration was considered as two counts, or one only, it was not demurrable on either of those grounds.

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pay him the said several monies respectively on request, yet the defendant has disregarded his promise, and has not paid any of the said monies, or any part thereof; and by reason and means of the dishonour of the said bill in the said first count mentioned, as in that count mentioned, he, the plaintiff, having indorsed and negotiated the said bill, to wit, on the day and year in the first count first mentioned, afterwards, to wit, on the day and year last aforesaid, as such indorser of the said bill as aforesaid, was called upon and obliged to pay, and did then pay and become liable to pay divers charges and expenses attendant upon and occasioned by the dishonour of the said bill as aforesaid, and the return of the same to him the plaintiff, to wit, the charges and expenses of protesting the said bill, as in the said first count mentioned, commission, postage, and divers other charges and expenses, amounting together to £10; to the damage of the plaintiff of £1000.

The defendant demurred to the first count of the declaration, assigning for causes, that the declaration stated that the bill was dishonoured by the same being presented for and refused acceptance, and that the same was dishonoured by being presented for and refused payment, and that either of the said dishonours was sufficient to maintain the action upon the bill to its full extent, and that it was altogether uncertain upon which of the said dishonours the plaintiff intended to rely, and that no certain or single issue could be taken; that the cause of action in the first count was stated uncertainly and in the alternative, and not directly and positively, as in effect it stated, that the bill was either dishonoured by a refusal to accept or a refusal to pay; and also that the statement of the special damage to the first count was altogether insufficient and uncertain, in that although it is alleged that there were two dishonours of the bill, yet it is stated in the allegation of special damage that the costs and expenses were occasioned by the dishonour of

the said bill, but by which of the said two several dishonours did not appear.

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To the last count the defendant pleaded non assumpsit.

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Mellor, in support of the demurrer, was in the first instance stopped by the Court, who called upon

Butt to support the declaration.—The first count does not contain two causes of action, but only two considerations for the promise; namely, the non-acceptance and the non-payment of the bill. But if the Court should be of opinion that it discloses two distinct causes of action, then they are two counts, and the demurrer is too large. [*Parke, B.*—They are not in the form of two distinct counts.] There is no necessity for any formal commencement; but if there be an objection on that ground, it should have been pointed out as a cause of special demurrer. *Jourdain v. Johnson* (a) is an authority to shew that the use of the word *respectively*, in the allegation of the promise to pay, will constitute them several counts. In a note to *Webber v. Twill* (b), it is said that “the common counts in a declaration may be contained in one count, stating that the defendant was indebted to the plaintiff in a given sum, as for instance £1000, as well for goods sold and delivered by the plaintiff to the defendant, as for money lent and advanced, and money paid by the plaintiff to the defendant, and money had and received by the defendant for the plaintiff, and that, in consideration thereof, the defendant promised to pay:” for which position *Rooke v. Rooke* (c) is cited as an authority.

Mellor, contra.—The first count is double. It is laid down as a rule in *Stephen on Pleading*, 292, “that the declaration must not, in support of a single demand, allege several distinct matters by any of which that demand is

(a) 2 C., M., & R. 564.

(b) 2 Saund. 122, n. 2.

(c) Cro. Jac. 245.

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Now here the declaration shews a complete cause of action, by alleging a protest for non-acceptance, *Crossly v. Ham* (a); it then alleges a presentment for and refusal of payment, which is another cause of action; which renders it double, and uncertain for which cause of action the plaintiff is proceeding. It is, therefore, in violation of the above rule. But then it is said it may be treated as two counts, and that the objection as to the informal commencement of the second count should have been pointed out as a cause of special demurrer: the answer to that is, that it is in effect pointed out as a cause of demurrer, when it is alleged that the count is uncertain and in the alternative, and that is sufficient. The case cited has therefore no application. The plaintiff, who has manifestly treated it as *one* count, has no right to turn round upon the defendant and say, What I have pleaded, and you have taken as *one* count, is, in reality, *two* counts informally pleaded. A party has no right so to plead as to mislead his opponent.

PARKE, B.—The declaration is good, in whatever way it is viewed. If the first part of it be considered as two counts, then the word "respectively" attaches a separate promise to each count, and the only objection would be that the second count is informally commenced; but with regard to that there is no special cause of demurrer assigned. If, on the other hand, the declaration be viewed as one count only, it is equally good; for then there are different causes of action arising out of different considerations, all of which are executed. According to the old form given in Saunders's Reports, there might be several different considerations included in one count in *indebitatus assumpsit*; and if we consider this as

(a) 13 East, 502, per Bayley, J.

as one count only, it amounts to this, that the defendant became liable to the plaintiff on a bill of exchange, in consequence of the non-acceptance thereof, and also on account of the non-payment thereof, and also on an account stated; the whole concluding with a promise to pay. Then how does that differ from the case of the common counts, for work and labour, goods sold and delivered, &c.? By analogy to the practice before the new rules, and which seems to rest on a sound foundation, we must hold the declaration good. Before the new rules, the whole would have been in issue under the plea of non assumpsit, but now the defendant must traverse the facts of presentment for payment and acceptance.

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The rest of the Court concurred.

Judgment for the plaintiff.

DOE *d.* CURZON and Others *v.* EDMONDS.

EJECTMENT for lands in the parish of Morden, in the county of Dorset. At the trial before *Coleridge, J.*, at the Dorchester Summer Assizes, 1839, it appeared that the action was brought to try the title of J. S. W. Sawbridge

In 1788, estates were settled, by marriage settlement, to the use of the wife for life, with remainders to her issue in tail,

with remainder to the settlor, (whose heiress at law she was), in fee. In 1818, by deeds to which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828:—*Held*, that inasmuch as the estate of J. F. was carved out of the estate tail of R. G., she had the same period for bringing an ejectment in respect of any of the estates comprised in the above deeds, as he would have had if he had continued alive; viz. twenty years from the year 1822, when his remainder came into possession.

Whether a writing amounts to an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14, is a question for the Judge, and not for the jury, to decide.

A party in possession, adversely, of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years." The bargain subsequently went off, and no rent was paid or lease executed:—*Held*, that this letter was not an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14.

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Erle Drax, Esq., and Jane Frances, his wife, two of the lessors of the plaintiff, to some fields at Morden, in the possession of the defendant as tenant to a Mr. John Filliter, under the following circumstances :—

By indenture of lease and release and settlement, dated the 6th and 7th of March, 1788, being the settlement made on the marriage of Richard Erle Drax Grosvenor, Esq., (therein called Richard Grosvenor), with Sarah Frances his wife, then Sarah Frances Drax, the daughter and heiress of Edward Drax, and niece of Thomas Erle Drax, (who was seised in fee of an estate called the Morden estate, including the manor of Morden, as heir at law of Sir Edward Ernle, Bart.), the said estate was limited to the use of the said Edward Drax for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the sons of the said Edward Drax successively in tail, with remainder to the use of Sarah Frances Drax for life, with remainder to trustees to preserve, with remainder to the use of the first and other sons of Sarah Frances Drax successively in tail; with divers other remainders over which did not take effect, the ultimate reversion being limited to the use of Thomas Erle Drax in fee. Thomas Erle Drax died without issue in 1789, leaving Edward Drax his next brother and heir at law; and he also died in 1791, leaving Sarah Frances Grosvenor his only child. By indentures of settlement of the 22nd and 23rd of May, 1818, to which Richard Erle Drax Grosvenor and Sarah Frances his wife, and Richard Edward Erle Drax Grosvenor, their only son, were parties, and by a common recovery suffered in pursuance thereof, the same estates were limited (subject to several powers of appointment, which were not exercised) to the use of Richard Erle Drax Grosvenor for life; with remainder to the use of the said Sarah Frances his wife, for life; with remainder to the said Richard Edward Erle Drax Grosvenor and his assigns for life; with remainder to his issue in tail; with remain-

der to the use of Jane Frances Grosvenor, his sister, (the lessor of the plaintiff), and her assigns for life, with remainder to her issue in tail, with other remainders over. Richard Erle Drax Grosvenor died in July 1819, and Sarah Frances, his wife, in 1822. Richard Edward Erle Drax Grosvenor, the son, died in 1828, unmarried and a lunatic, leaving his sister Jane Frances, then the wife of Mr. Drax, the lessor of the plaintiff, him surviving.

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The fields in question were inclosed from the wastes of the manor of Morden in the year 1794, by two persons of the name of Serjeant and Smith; who, in 1803, sold them to a Mr. Wright, of Wareham. Wright occupied them about seven years, without any rent being paid by him or demanded in respect of them. In 1811, he let them to a Mr. Thomas Bailey, an innkeeper of Wareham, at a rent of 3*l.* 3*s.* per annum. In 1814 Wright became a bankrupt, and in April of that year a sale by auction was advertised of his estates, by a printed particular, in which these fields were not mentioned. Mr. Filliter, an attorney at Wareham, was the solicitor to the assignees, and kept all the papers belonging to the bankruptcy. In July 1814, the assignees of Wright demanded from Bailey, and he paid them, a half-year's rent, due in respect of the fields in question. Thomas Bailey died at Christmas 1814, and his son John Bailey succeeded him as innkeeper. John Bailey attended the Court Baron of Morden manor in 1814 and 1815, and paid a quit rent of 2*s.* 6*d.* in respect of the fields in question. In 1815, John Bailey paid to Filliter's clerk a half-year's rent then due for the fields, and received from him a receipt (in Filliter's handwriting) as follows:—

“1815, 10th April. Memorandum that Mr. John Bailey has this day paid me the sum of 1*l.* 11*s.* 6*d.*, being half a year's rent of a meadow at Northport, *belonging to Mr. Grosvenor*, and due Lady-day last.

“For Mr. Filliter,

“£1 11*s.* 6*d.*

“THOMAS ARNOLD, jun.”

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At that period, Bailey's tenancy terminated, pursuant to a notice to quit given by the assignees of Wright to his father, in September 1814. No direct evidence was given as to the subsequent occupation of the property, until the year 1832, when, Filliter being in possession of it, Mr. Shettle, the steward of the manor, applied to him to pay a quit rent or acknowledgment in respect of it. Nothing, however, was paid; and on the 1st of May, 1834, Shettle wrote to Drax as follows:—

“ Dear Sir,—Mr. Drax is desirous of knowing your determination on the subject on which I have already several times communicated with you, relative to the land formerly held by Mr. Wright. You will recollect that I proposed on the part of Mr. Drax, that you should continue to occupy the lands in question by paying a moderate rent, and to enter into an agreement for holding the same. Your early decisive reply will oblige, Yours truly,

“ THOMAS SHETTLE.”

Filliter replied by requesting a personal conference on the subject, which being declined, he wrote as follows:—

“ Wareham, 13th May, 1834.

“ Dear Sir,—Before I can well give the required reply, I think it but fair and reasonable that I should be acquainted with the amount of the rent, as well as the terms intended to be proposed—the latter I believe you stated to be twenty-one years. I remain, &c.

“ Mr. SHETTLE, &c.

“ GEORGE FILLITER.”

To this letter Mr. Shettle replied:—

“ Mapperton, 19th May, 1834.

“ Dear Sir—I am desired by Mr. Drax to say he cannot at present fix the amount of the rents for the lands in question, but he expects you will forthwith give the reply

which I have repeatedly requested of you, or he will place the matter in the hands of his solicitor.

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"I am, &c.,

"THOMAS SHETTLER."

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Mr. Filliter replied by the following letter:—

"Wareham, 24th May, 1834.

"Dear Sir—Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have at length made up my mind to accede to the proposal you made, of paying a moderate rent, on an agreement for a term of twenty-one years.

"I am, &c.,

"GEORGE FILLITER."

Nothing further passed on the subject until 1837, when Shettle called on Filliter by Mr. Drax's direction, and offered him the fields on lease at a rent which he declined to pay, whereupon this ejectment was brought, in Michaelmas Term 1838.

At the trial, it was contended for the defendant, that the right of the lessors of the plaintiff to recover was barred by an adverse possession of upwards of twenty years, viz. from the year 1815; inasmuch as Mrs. Drax's title accrued under the deeds of 1788, modified by the deeds of 1818, and therefore the Statute of Limitations began to run against her from the latter period. For the plaintiff it was insisted, first, that her right of action accrued in 1828, on the death of her brother, the preceding tenant for life; but, at all events, that the letter of Filliter of the 24th of May, 1834, amounted to a sufficient acknowledgment in writing of the title of the lessors of the plaintiff, to satisfy the 14th section of the 3 & 4 Will. 4, c. 27. The learned Judge left it to the jury to say whether the letter amounted to an acknowledgment of title or not, expressing his opinion that it did not, as it was made only with a view to an

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arrangement which was not carried into effect. The jury found for the defendant, and the learned Judge thereupon gave the plaintiff leave to move to enter a verdict for him, in case the Court should be of opinion that the Judge ought to have decided on the effect of the letter, and that it amounted to an acknowledgment of title; or in case they should be of opinion that the adverse possession did not begin to take effect, as against Mrs. Drax's interest, until a period within twenty years.

In Michaelmas Term last, *Erle* obtained a rule nisi accordingly, against which

Crowder (with whom was *Bond*) now shewed cause.—First, there was in this case a sufficient adverse possession of twenty years, to bar the lessors of the plaintiff. At the period of the execution of the deeds of 1788, Mrs. Drax was not in esse, and could take only under the general limitation to the issue of Sarah Frances Drax. Between that period and the execution of the deeds of 1818, viz. in 1815, the adverse possession of Filliter commenced. Under the deeds of 1818, the present Mrs. Drax took a vested interest for life. But as regarded an adverse possession before begun, the giving her a particular estate could not change the nature of that possession, which was already running against the parties then entitled. In 1815 Richard Erle Drax Grosvenor was entitled to the possession. He could not afterwards change the nature of the estate, and thereby make a longer adverse possession than twenty years necessary to satisfy the statute. The claim of the lessors of the plaintiff is altogether referable to the settlement of 1818. Now, if things had remained in the same situation, without the execution of that deed, the parties entitled in 1815 would clearly have been barred: could they then vary their rights by afterwards executing that deed? No doubt the title in possession of Jane Frances Drax commenced in 1828; but she takes by virtue

of the deed of 1818; and when her title was so created the adverse possession had begun to run. [*Parke, B.*—When those under whom the defendant claims took possession, the limitations of the deed of 1788 were in force, and it gave a remainder in tail to the heirs of the body of Sarah Frances Drax, i. e. to Richard Edward Erle Drax Grosvenor. Then, in 1818, he converted his estate tail into a fee, and out of that carved the estate of the lessor of the plaintiff. Therefore, independently of the late statute, the ejectment would have been in time within twenty years after his estate in remainder came into possession, viz. in 1822.] Then this objection arises: that the lessor of the plaintiff claims under a recovery suffered at a period when the land was held adversely, and therefore there was no good tenant to the præcipe. [*Rolfe, B.*—If the recovery did not operate on the estate tail, then, inasmuch as Richard Edward Erle Drax Grosvenor is dead without issue, Mrs. Drax takes as the heir at law of Richard Erle Drax, under the ultimate limitation in the deed of 1788, and then her possession did not accrue until 1828, according to the third section of the statute.] The effect of the recovery would, however, probably be to create a fee, there having been no *adverse act* previously to that period: then the adverse possession continued as against the parties entitled by the creation of that fee. [*Parke, B.*—But the estate for life is created out of the preceding estate tail, therefore the lessor of the plaintiff has the same time for bringing her ejectment as the tenant in tail himself had, viz. from 1822, when his remainder came into possession, until 1842.] The estate tail was destroyed by the recovery. [*Parke, B.*—No; it was only enlarged into a fee, out of which the new estate tail to himself, and the estate of the lessor of the plaintiff, are carved.]

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Erle and Cockburn, contra, were stopped by the Court.

PARKE, B.—It is clear the lessor of the plaintiff had

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the same time to bring an ejectment as the tenant in tail himself would have had if he had continued alive. The effect of the deed of 1818 and of the recovery was, to bar all remainders over, and to create new estates out of his estate tail: therefore the parties who take such estates have the same time that he had, viz. twenty years from 1822. With respect to the other point, although it is unnecessary to decide it, it is clear that the effect of the acknowledgment is a question for the Judge (a). Here, however, the learned Judge was quite right in the opinion he expressed, that it was no acknowledgment of title, because there was no final bargain.

ALDERSON, B.—The learned Judge left it to the jury with an expression of an opinion which we think right, and the jury found according to that opinion.

BOLFE, B., concurred.

Rule absolute.

(a) See *Morrell v. Frith*, 3 M. & W. 402.

—◆— LUCY v. INGRAM.

Case against
the owner of a
vessel, for an
injury done by

CASE.—The declaration stated, that the plaintiff, before and at the time, &c., was lawfully possessed of a certain her in running foul of the plaintiff's barge. Plea, that at the time of the injury, the vessel was being conducted, and was navigating the river Thames, under the conduct of a licensed pilot in charge of the vessel, *under and in pursuance of the provisions of the 6 Geo. 4, c. 125*, and that the damage happened to the plaintiff by the default, incompetency, and incapacity of such pilot. Replication, that before the said time when &c., the vessel had, on completing a voyage from India, been brought by a licensed pilot into the St. Katherine's Dock, and that having there discharged her cargo, was, just before and at the said time when &c., being removed, and in the course of removal, for the purpose of going out of that dock to a certain dry dock in the port of London to be repaired, and that the said vessel was not, at the said time when &c., otherwise navigating or passing upon the said river Thames.

Held, first, that the circumstances stated in the replication brought the case within the exception in the 63rd section of the act, and that the owner was not bound to employ a pilot.

Secondly, that the words "wanting a pilot," in the 72nd section, are not to be confined to such vessels as are, by the provisions of the act, bound to take a pilot, but are to be construed as applying to any vessel, the master or owner of which thinks fit to require one.

Thirdly, that inasmuch as under the 72nd section the pilot could not lawfully refuse to go on board and take charge of any vessel wanting a pilot when required by the owner so to do, he must be considered, when so required and employed, as acting under some of the provisions of the act, and not as the private servant of the owner, and therefore that the owner was protected by the 55th section of the act from his *prima facie* liability in respect of the injury occasioned by the act of the pilot, whilst he was so employed by the owner.

barge or lighter, of great value, &c., then lawfully being in the river Thames, and the defendant was also possessed of a certain ship or vessel in the river aforesaid, and then had the care, direction, and management of the same; yet the defendant, not regarding his duty in that behalf, whilst the said barge, and also the said ship, were so respectively in the said river, to wit, on &c., took so little and such bad care of the said ship, and governed and navigated the same in so unskilful, negligent, careless, and improper a manner, that the same, by and through the negligence, &c., of the defendant in that behalf, then with great force and violence ran foul of and struck the said barge of the said plaintiff, and thereby then and there greatly broke, damaged, and injured the same, &c.

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To this declaration the defendant, after setting forth an appointment by the Corporation of the Trinity House, pursuant to the stat. 6 Geo. 4, of one John Gilbert to act as a pilot between London Bridge and Gravesend, pleaded that the said ship or vessel, the defendant then being the owner thereof, was at the time of the committing of the said supposed grievance, being conducted, and was navigating and passing upon the river Thames aforesaid, within the limits aforesaid in the said license mentioned, to wit, between London Bridge aforesaid and Gravesend aforesaid, under the conduct of the said John Gilbert, as such pilot as aforesaid; that the said ship or vessel then was under the charge of the said John Gilbert, and he was then acting in charge thereof, as such pilot as aforesaid, under and in pursuance of the provisions of the said statute, the said John Gilbert then being duly qualified as such pilot as aforesaid to have the charge thereof. And the defendant further says, that the said loss and damage in the said declaration mentioned, happened to the plaintiff from and by reason and means of the neglect, default, incompetency, and incapacity of the said John Gilbert, so acting in charge of the said ship or vessel as aforesaid.—Verification.

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vessel, and having the command thereof, or if in ballast, any person or persons appointed by any owner, or master, or agent of the owner thereof, for afterwards removing such ship or vessel in such port or ports, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel." The object of that clause is to provide for cases where vessels, in consequence of the dock being full, are obliged to remain outside at moorings assigned for them, until there is room for them to come into dock, and then they are warped in without any pilot being employed; and it was also intended to apply to cases where the vessel, after discharging her cargo, leaves the dock, when, in case of the export dock being full, the vessel is put into the tier in the river. That would be only a change of moorings, and the object of the act was to protect the owner from liability to a penalty for not employing a pilot on such occasions only. But it is not competent for the owner to navigate the ship within the prescribed limits, without putting her in charge of a licensed pilot. The allegation in the replication here is, "that the said ship or vessel of the defendant was in the course of removal in the said port, for the purpose of going out of the said dock, to wit, in order that the same ship or vessel might be taken to a dry dock, within the said port of London, to be repaired." But such a removal is not necessarily a mere change of moorings, as contemplated by the 63rd section, but may comprehend a navigation of the ship on the river, within the limits of the port, from one dock to another, for the distance of some miles, for the purpose of taking her to a dry dock to be repaired. But even assuming that the defendant was not bound to employ a pilot, still, under the 72nd section, a pilot cannot refuse to take charge of any vessel if required so to do, and if he does so, then he must be considered as being in charge of the vessel in pursuance of the provisions of the act. That section enacts, "that every pilot licensed as aforesaid, who

shall, when not actually engaged in his capacity of pilot, refuse or decline, or wilfully delay to go off to, or on board of, or to take charge of, any ship or vessel *wanting a pilot*, and within the limits specified in his license, upon the usual signal for a pilot being displayed from such ship or vessel, or upon being required so to do by the captain, or by the master or other person having the command of such ship, &c., unless it shall be unsafe for such pilot to obey such signal or comply with such requisition, or he shall be prevented from so doing by illness or other sufficient cause, shall forfeit for every such offence any sum not exceeding £100, nor less than £10, and shall be liable to be dismissed from being a pilot, or suspended from acting as such."

Now, according to that section, a pilot cannot refuse to take charge of a vessel, without subjecting himself to the penalties of the act, and when he does so take charge of the vessel, the public have the protection which the law contemplated, and the owners are not liable. The pilot was duly qualified to take charge of this vessel in her passage from the St. Katherine's Dock to the dry dock, for the purpose of repair; and having taken charge of her, he was acting in the charge of the vessel, in pursuance of the provisions of the act.—He cited *Huggett v. Montgomery* (a), *Bowcher v. Noidstrom* (b), *Nicholson v. Mounsey* (c), *Attorney-General v. Case* (d), *Carruthers v. Sydebotham* (e) *Bennet v. Moita* (f), *Ritchie v. Bowsfield* (g), and *M'Intosh v. Slade* (h).

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Erle, contra.—The replication is good, and the facts stated in it bring the case within the 63rd section of the act. If so, it was optional in the owner to take a pilot on board; and if he took one voluntarily, then the pilot must

(a) 2 N. R. 446.

(b) 1 Taunt. 568.

(c) 15 East, 384.

(d) 3 Price, 302.

(e) 4 M. & Selw. 77.

(f) 7 Taunt. 258.

(g) Id. 309.

(h) 6 B. & C. 662; 9 D. & R. 738.

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be considered as a mere servant of the owners, and they are responsible for his negligence. In order to exempt himself from liability, and to bring himself within the protection of the 55th section, the owner is bound to shew that he was compellable by law to employ a pilot. *M'Intosh v. Slade* is an authority in favour of the defendant. The judgment there proceeds upon the principle, that if it be optional on the part of the owner to employ a pilot, and he does so, he is not exempted from liability by so doing. Now here the facts stated in this replication shew that the ship had arrived at her destination, that her voyage was at an end, and that the removal was merely from one dock to another, which brings the case within the 63rd section; the owner was therefore not bound to take a pilot. In *M'Intosh v. Slade*, Bayley, J. says, "There was no question but that the injury was occasioned by the neglect or default of the pilot; so that the owners were clearly entitled to an acquittal under the 55th section of that act, if, under the circumstances, it was necessary that the brig should have a pilot on board at the time: but it was insisted, that the protection under section 55 extended to no case where the ship was under no obligation to have a pilot on board; and it was contended, that at the time this injury was done, this brig was under no such obligation. It is upon this latter point our opinion is founded; and we have had the benefit of conferring with Lord *Tenterden* upon the subject." It was there held, that the owners were bound to have a pilot on board, as the voyage was not at an end. But here the voyage was at an end, and the owner was under no obligation to take a pilot to remove the ship from one dock to another for the purposes of repair. [*Parke*, B.—Suppose it be optional in the owners to take a pilot or not, still the pilot is bound, by the 72nd section, to take charge of a vessel when required; and then the question is, whether the owner is not protected by the 55th section.] In *M'Intosh v. Slade*, that point was before the Court, but

it was not then decided; and in the absence of any authority, the Court will incline to promote the public convenience, and that will best be done by deciding in favour of the personal responsibility of the owners, which will prevent them from running improper risks, to the danger and injury of the public.

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Platt, in reply.—If the obligation of the master to take a pilot on board is to be the test, the 55th section of the act, as applied to many of its provisions, would be of no use or avail whatever. By the 60th section it is enacted, that it shall be lawful for his Majesty, by an Order in Council, to permit and authorize ships and vessels, not exceeding the burthen of sixty tons, and not having a British register, to be piloted and conducted without having a duly licensed pilot on board. Now, supposing a ship, having the permission there mentioned to exclude a licensed pilot, comes within the limits of the port, and for the safety of the cargo takes a licensed pilot on board notwithstanding, is the owner to be held liable, because he had the choice whether he would employ one or not? The same argument applies to the 61st section. It is submitted, that the 55th section does not apply only to cases where the master is obliged to employ the pilot, but to all cases where a pilot is employed, and takes charge of a vessel within the limits mentioned in the 2nd section of the act. If the act be not so construed, it will lead to great injustice and inconvenience.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action brought by the plaintiff to recover damages for an injury sustained by him, in consequence of a ship of the defendant having run foul of the plaintiff's barge, in the river Thames, between London and Gravesend. The defendant pleaded, that at the time when

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the accident occurred, his ship was navigating and passing on the river Thames, under the conduct of a licensed pilot, who then had the charge of the ship as such pilot, under and in pursuance of the provisions of the Pilot Act, and that the damage was occasioned to the plaintiff by the default and incapacity of such pilot, so acting in charge of the ship.

The plaintiff replied, that, previously to the accident, the defendant's ship had, on completing a voyage from India, been brought by a licensed pilot into the St. Katherine's dock, and having there discharged her cargo, was, at the time of the accident, in the act of being removed from the St. Katherine's dock to a certain dry dock in the port of London, for the purpose of being there repaired; and was not otherwise navigating or passing on the river Thames.

To this replication the defendant demurred, and the question for the decision of the Court is, whether, according to the facts on this record, the defendant is relieved from his *prima facie* liability to answer to the plaintiff in damages for the injury occasioned by the neglect of the person who had, in fact, the charge of his ship.

This depends entirely upon the construction of the last Pilot Act, 6 Geo. 4, c. 125. By the 2nd section of that statute it is provided, that all ships navigating and passing on the river Thames (except as hereinafter provided) shall be conducted and piloted, within certain limits there specified, including the limits between London Bridge and Gravesend, by pilots appointed and licensed for that purpose by the Corporation of the Trinity House, and by no other person whatsoever; and penalties are imposed by the act on persons, who, not being licensed pilots, take charge of any ship within the limits in question. The 55th section enacts, that no owner of any ship shall be answerable for any damage which shall happen to any person by reason of the neglect or incapacity of any licensed pilot, acting in the charge of such ship under any of the provisions of that act.

The 63rd section provides, "that when any ship shall have been brought into any port by any licensed pilot, nothing in the act contained shall subject to any penalty the master, or person having the command of such ship, for afterwards removing her in such port for the purpose of entering into or going out of any dock, or for changing her moorings."

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The 72nd section enacts, "that every licensed pilot who shall, without lawful excuse, refuse to take charge of any ship wanting a pilot, upon being required so to do by the master, or any person having the command thereof, or being interested therein, shall for every offence forfeit 100*l*."

Under the 55th section of the act, the defendant is clearly exempted from all liability to the plaintiff, if, at the time of the accident, the pilot was, according to the averment in the plea, in charge of the ship in pursuance of any of the provisions of the act.

The plaintiff does not dispute that the pilot was in fact in charge of the ship, but he says, by his replication, what amounts to this—that, at the time of the accident, the ship was in circumstances in which the act has not made a pilot necessary; and, consequently, that the pilot was not in charge of the ship in pursuance of the provisions of the act, but could only be considered as the private servant of the owner.

If the replication does shew that the employment of the pilot was indeed mere matter of private arrangement between the parties, that the owner was not bound to employ a pilot, and that the pilot might lawfully have declined to take charge of the ship when called on by the owner, then the argument of the plaintiff might be well founded. But if, under the circumstances, the owner was bound to employ a pilot, or if the pilot, when called on by the owner, was bound to take charge of the ship, then we think that he would be acting under and in pursuance

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the accident occurred, his ship was navigating and passing on the river Thames, under the conduct of a licensed pilot, who then had the charge of the ship as such pilot, under and in pursuance of the provisions of the Pilot Act, and that the damage was occasioned to the plaintiff by the default and incapacity of such pilot, so acting in charge of the ship.

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The 63rd section provides, "that when any ship shall have been brought into any port by any licensed pilot, nothing in the act contained shall subject to any penalty the master, or person having the command of such ship, for afterwards removing her in such port for the purpose of entering into or going out of any dock, or for changing her moorings."

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Under the 55th section of the act, the defendant is clearly exempted from all liability to the plaintiff, if, at the time of the accident, the pilot was, according to the averment in the plea, in charge of the ship in pursuance of any of the provisions of the act.

The plaintiff does not dispute that the pilot was in fact in charge of the ship, but he says, by his replication, what amounts to this—that, at the time of the accident, the ship was in circumstances in which the act has not made a pilot necessary; and, consequently, that the pilot was not in charge of the ship in pursuance of the provisions of the act, but could only be considered as the private servant of the owner.

If the replication does shew that the employment of the pilot was indeed mere matter of private arrangement between the parties, that the owner was not bound to employ a pilot, and that the pilot might lawfully have declined to take charge of the ship when called on by the owner, then the argument of the plaintiff might be well founded. But if, under the circumstances, the owner was bound to employ a pilot, or if the pilot, when called on by the owner, was bound to take charge of the ship, then we think that he would be acting under and in pursuance

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of some of the provisions of the act, and that the owner is entitled to the indemnity given by the 55th section.

It is clear that, in the present case, the owner need not have employed a pilot at all. The ship is stated in the replication to have been merely in the act of being removed from the St. Katherine's Dock, where she had discharged her cargo, to a repairing dock, which brings the case precisely within the exception in the 63rd section.

But we think that, under the 72nd section, the pilot was bound, when called on, to take charge of the ship, for the purpose of removing her to the dry dock, and, consequently, that he was in charge of the ship under the provisions of the act.

That section requires any pilot, not having a lawful excuse, to take charge of any ship *wanting a pilot*, when called on by the master or owner so to do; and the question is, what is the meaning of these words, *any ship wanting a pilot*? If they mean any ship being bound by the provisions of the act to take a pilot, then, inasmuch as the owner or master was certainly not bound, under the circumstances appearing on this record, to take a pilot, the 72nd section would not apply. But we think this is not the true meaning of these words, and that they must be construed to mean *any ship the master or owner of which thinks fit to require a pilot*.

Had the act contained no other exemption from the obligation to take a pilot, except that contained in the 63rd section, there might have been no great difficulty in holding that the words *wanting a pilot*, in the 72nd section, meant *for which a pilot is necessary under the provisions of the act*, the effect of which construction would be to make the obligation on the master to take a pilot, and the obligation of the pilot to serve, co-extensive.

But, in looking to the act, it appears there are other very extensive classes of cases, in which the masters of ships are exempted from penalties for not taking a pilot, but in which,

nevertheless, it is impossible to believe that the legislature did not mean to make it the duty of the pilot to serve if called on.

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It is only necessary to refer to section 59, by which "all British registered ships coming from the Baltic or North Sea by the North Channel, all ships laden with stone coming from Guernsey or Jersey," and many others, are exempted from penalties for not taking a pilot.

So also, by section 62, masters of vessels residing at Dover, and being also part-owners, are exempted from the necessity of taking a pilot.

Could the legislature possibly have meant, that if the master of a trading vessel from Archangel, or of a ship laden with stone from Jersey, should, on arriving within the prescribed limits, have need of, and make a signal for a pilot, (see section 19), that a licensed pilot should be at liberty to decline to take her in charge, on the ground that she was not a ship *wanting a pilot*? It is moreover clear, that the 72nd section in terms imposes on the pilot the duty of taking in charge any ship of her Majesty, when required by the officer in command so to do, and yet the 86th section expressly enacts, that no ship belonging to her Majesty shall be bound to take a pilot; from all which it is obvious, that the words, "*wanting a pilot*," cannot be confined to the ships for which the statute makes a pilot necessary. The correctness of this view of the case is further confirmed by the 25th section of the act and the schedules to which it refers, the effect of which is to fix the particular sum to be demanded by a pilot, when engaged in this very duty of removing a ship into a dry or wet dock; and it is not probable that the legislature would have fixed the rate of payment, if the service rendered by the pilot was mere matter of private contract, and that which he might, if he had thought fit, have declined to perform.

Supposing it, then, to be established, as we think it is,

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that the pilot, when called on by the owner, was bound to take charge of the ship, for the purpose of removing her from the St. Katherine's Dock to the dry dock, and that he was bound to perform this service at the rate of payment fixed by the act, we think he certainly *was acting in the charge of the ship*, in pursuance of some of the provisions of the act, namely, the provisions contained in section 72, which obliged him to take the ship in charge when required so to do, and the provisions contained in section 25, and the schedules which precluded him from charging above a certain sum for his services. And as the 55th section exempts the owner from responsibility in respect of accidents happening by reason of the default of any pilot, *acting under or in pursuance of any of the provisions of the act*, we think the defendant is not liable to answer to the plaintiff for the injury he has sustained.

In coming to this conclusion, we do not impugn any of the previous decisions.

In *M'Intosh v. Slade* (a), the ship having put into the London docks, but not having broken bulk there, was afterwards removed under charge of a pilot to a quay higher up the river, for the purpose of there discharging her cargo, and while she was in the act of being so removed, the accident occurred through the default of the pilot. On the part of the plaintiff it was there contended, first, that under the circumstances of the case, the master was not bound to take a pilot; and, secondly, that as he was not bound to do so, he could not, by voluntarily doing what he need not have done, bring himself within the protection of the 55th section. The Court decided, that under the circumstances of that case, the master was bound to take a pilot, so that the other question did not arise.

We do not advert particularly to the other cases cited at the bar; it is sufficient to say, they are none of them inconsistent with our decision in this case. It

(a) 6 B. & C. 657.

may, indeed, be admitted, that in many of the cases, the Judges, in giving their judgments, refer to the obligation of the master to take a pilot, as the ground on which his irresponsibility is founded; and no doubt that is the foundation, and probably the only foundation, on which it can rest independently of the statutes; but the language of the exempting clause in the last Pilot Act certainly carries the doctrine further, and it may well be conceived that this extension of the common law doctrine was not accidental, but intentional. The object of the legislature in establishing pilots, has been to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound under a penalty in a great measure to divest himself of its control, and to give up the charge to the pilot. As a necessary consequence, the master and owners are exempted from responsibility for acts resulting from the mismanagement of the pilot. But the legislature has considered that there may be some classes of cases, in which the presumption of due competency on the part of the master is so great, as to make it safe to relieve him from the obligation of taking a pilot, if he chooses to navigate for himself; still, however, making it the duty of the pilot to serve, if required so to do, and in most of such excepted cases preventing the master from employing any person other than a licensed pilot, if he does not undertake the navigation himself. The language in which the legislature has exempted masters or owners from responsibility on account of accidents arising from the fault of the pilot, is certainly compre-

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hensive enough to embrace these latter cases, as well as those in which the taking a pilot has been made matter of absolute obligation; and it may have been considered desirable to give this more extended exemption, as an inducement to take a pilot, even in cases where such a course might, perhaps, be safely dispensed with. It is always the interest of the public, that the ship should be under the control of a pilot, because the legislature has taken what it considers due security for his competency; and therefore, even where taking a pilot is optional on the part of the master, the legislature may well have intended to encourage his employment, by extending, according to our construction of the 55th section, the benefit of exemption from responsibility. Whether, however, this has or has not been intentional on the part of the legislature, we think the extended construction must prevail. The case before us is clearly within the words of the exempting clause; and we must therefore hold it to be within its spirit and meaning, unless (which is not the case) some manifest inconvenience or inconsistency should result from our so doing.

For these reasons, we think that the judgment must be for the defendant.

Judgment for the defendant. .

DONALDSON v. THOMPSON.

ASSUMPSIT.—The declaration stated, that the defendant, on the 1st of July, 1835, made his promissory note payable on a certain day, that he delivered the note to the payee, and promised to pay the same according to the tenor and effect thereof; that default was made in payment of the note when it became due, whereby the defendant became liable to pay the amount. The second count was upon an account stated, and alleged that on &c. (a day long subsequent to the note becoming due) the defendant became and was indebted to the plaintiff in &c., on an account then stated between them; and the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money on request:—*Held*, that this was an action on a promissory note, within the meaning of the new rules, and that the plea of non assumpsit was inadmissible.

in writing, and thereby promised to pay to one Dorothy Critchley, or order, £345, by instalments, in manner following: that is to say, the sum of £15, part thereof, on the 1st July, 1837; the sum of £15, further part thereof, on the 1st July, 1838; and the sum of £315, the residue thereof, on the 1st of July, 1839, and then delivered the said note to the said D. C., and promised her to pay the same according to the tenor and effect thereof; and the said D. C. then indorsed the same to the plaintiff; and the plaintiff in fact saith, that afterwards, to wit, on the 1st of July, 1839, default was made in payment of the said sum of £315 in the said promissory note specified, which had then become due and payable, whereby and according to the tenor and effect of the said note and of the said indorsement, the said defendant then became liable to pay to the plaintiff the said sum of £315 in the said note specified, and which so became due before the commencement of this suit. And whereas also the defendant, on the 1st of December, 1839, became and was indebted to the plaintiff in £500, on an account then stated between them: and the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money on request, yet he hath disregarded his promises, and hath not paid the said several monies above mentioned, or any of them, or any part thereof.

Plea, non assumpsit.

Special demurrer, assigning for cause, that by the new rules of H. T., 4 Will. 4, *Pleadings in particular Actions—Assumpsit* 2, the plea of non assumpsit, in all actions upon bills of exchange and promissory notes, is declared to be inadmissible, and the plaintiff hath above in the said first count declared upon a cause of action arising upon a promissory note, and the said plea purports to be an answer to such cause of action, and appears on the face of it to be an answer to the whole declaration.

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Crompton appeared in support of the demurrer, but the Court called on

Cowling to support the plea.—This is not an action on a promissory note, within the meaning of the new rules, which apply only to actions on bills or notes simpliciter, where the promise to pay is merely the promise implied by law. Here the promise alleged in the declaration is not the ordinary promise to pay the note according to the tenor and effect; but that long after the note had become due, and after default had been made in the payment, the defendant promised to pay the amount of it. The rule was intended to prohibit the use of this plea, only in cases where the bill or note is the sole ground of the action, and the promise relied upon is the promise implied by law. *Timmis v. Platt* (a) is an authority to that effect. It was there held, that if an executor declares on a bill or note payable to his testator, laying a promise to pay himself, such promise may be denied by a plea of non assumpsit, notwithstanding the new rules. The declaration is a departure from the forms given by the new rules; and having stated a promise subsequent to the note becoming due, it must be presumed that the plaintiff seeks to recover upon it, and not upon the promise implied by law from the note itself, and therefore the plea is good.—The Court then called upon

Crompton, in support of the demurrer. The first count of the declaration is in the form given by the rules of T. T., 1 Will. 4, only that there being a count as for another cause of action, one promise is laid at the end, applicable to both counts. [*Parke*, B.—The objection is, that you allege a promise on a different day.] That would only be ground of special demurrer. [*Parke*, B.—If they had demurred specially, you might have said that you meant to rely upon an express promise on a subsequent day.] It is unnecessary, in an action on a promissory note, to allege any pro-

(a) 2 M. & W. 720.

mise at all, as the promise is implied by law. The day stated in the second count is immaterial, and means any day the party pleases. It would be sufficient for the plaintiff at the trial to produce and prove the note, and then it would appear that it was made by the defendant, and that it was due, which would entitle the plaintiff to recover the amount of it. That shews that the declaration is on a promise implied by law, and that the day is immaterial. The plea is intended as a traverse of the making of the note, which the new rules have prohibited from being done by the plea of non assumpsit, and such plea is therefore inadmissible.

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Cowling, contra.—This form of declaration is not in accordance with the new rules. The promise alleged in the form there given, in an action by the indorsee against the maker, is a promise to pay according to the tenor and effect of the note; but that is not the promise here laid, but a totally different one, namely, a promise to pay on a day subsequent to the note becoming due. If it be otherwise, and there be also the implied promise to pay according to the tenor and effect, then there are two promises relating to the same cause of action.

PARKER, B.—This is an action by the indorsee against the maker of a promissory note; and on referring to *Bayley on Bills* (a), I find it is unnecessary to allege any promise, as the promise is always implied by law. If the cause had gone to trial, it would not have been necessary for the plaintiff to prove anything but the note itself, in order to support the issue raised on this plea. The plea is therefore clearly inadmissible since the new rules.

The rest of the Court concurred.

Judgment for the plaintiff.

(a) P. 408; referring to *Wegeraloffe v. Keen*, 1 Stra. 214. See *Griffith v. Roxbrough*, 2 M. & W. 734.

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The Bristol and
Exeter Railway
Act, 6 & 7
Will. 4, c. xxxvi,

EJECTMENT to recover a piece of land in the parish of Uphill, in the county of Somerset. At the trial before s. 25, enabled the Company, in case (inter alia) any person whose lands should be required for the purposes of the act, should, for twenty-one days after notice in writing given to him, neglect or refuse to treat, or should not agree with the Company for the sale of his interest, to issue a warrant under their common seal, or under the hands of three at least of the directors, to the sheriff of the county in which the lands should be, commanding him to summon and return a jury, who should inquire of, assess, and give a verdict for the amount of money to be paid for the purchase of such lands, and for compensation for damage thereto: and that the sheriff should accordingly give judgment for such purchase-money, &c., which should be binding and conclusive upon all persons; fourteen days' notice being given of the time and place of the inquiry. A subsequent clause of the act (s. 242) enacted, that the whole of the sum therein mentioned as the probable expenses of making the railway, &c., should be subscribed for before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway, should be put in force.

An inquisition taken under s. 25, recited that notice had been given to the party that his lands were required by the Company for the purposes of the act, and that he had not within twenty-one days afterwards agreed with the Company for the sale of them; and also that fourteen days' notice had been given of the time and place of the inquiry before the sheriff:—*Held*, in ejectment by this party against the Company for these lands, subsequently taken by them under the act, that the inquisition was sufficient in form, and that it need not set forth that the whole capital had been subscribed; but that if this were the fact, it should come by way of answer from the plaintiff.

The 57th section of the act enacted, that the lands to be taken for the line of the railway should not exceed twenty-two yards in breadth, except where a greater breadth should be necessary for waiting places, embankments, cuttings, &c. &c.: and the 59th section provided, that the Company, in making the railway and other works, should not deviate from the line delineated on the plan deposited with the clerk of the peace in pursuance of the act, with or without consent of the owners or occupiers of the lands, more than 100 yards, and that no deviation should extend into the lands or property of any person not mentioned in the book of reference to the plan, unless omitted by mistake: and the Company were empowered to make such deviations in the section as might be necessary in consequence thereof:—*Held*, that this section only prohibited the Company from making the substituted line of the railway itself at a greater distance than 100 yards from the line delineated in the plan; but that it did not prevent them from taking lands at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c.: the intention of the act being to give the Company the same incidental powers with respect to the deviated line, as they had with respect to the original line.

Held, also, that a party whose lands were so taken could not object that the Company had taken, for the same purpose, lands of another person not mentioned in the book of reference.

The 47th section of the act enabled the Company, on payment of such sum as *should have been* awarded by the jury to the party, or, in case (inter alia) he should refuse or neglect to convey the lands, on payment of it into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to the credit of the party, subject to the order of the Court, to enter upon and take the lands. By the 257th section, the compulsory powers of the act were limited to the period of two years after the passing of the act; which expired on the 19th of May, 1838. By a subsequent act, 1 Vict. c. xxvi, (which received the royal assent 12th June, 1838), s. 1, all the powers and clauses of the former act were to extend to the works, &c., to be done under that act, as if repeated and re-enacted in it. S. 2 repealed s. 47 of the former act. S. 12 revived the time limited by the former act for taking and using lands, and extended and enlarged it for three years from the expiration of the two years mentioned in the former act: and s. 14 enacted, that upon payment of such sums as *should have been* awarded by

Erskine, J., at the last Somersetshire Assizes, it appeared that, in the month of June, 1839, the plaintiff being in possession of the land in question, the defendants took possession of it under the compulsory powers of their act of Parliament, 6 & 7 Will. 4, c. xxxvi, fenced it off, and excluded the plaintiff from the occupation of it. The defendants put in a warrant to the sheriff of Somersetshire, signed by three directors of the Company, pursuant to the 25th section of the act, to summon a jury, and hold an inquisition, to assess the purchase-money to be paid to the plaintiff for the land in question, the plaintiff having refused to treat with the Company for the sale of his interest therein. They then put in the inquisition itself; of which the following is a copy:—

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“An inquisition indented, taken pursuant to the act hereinafter mentioned, at &c., on the 27th day of November, in the 1st year &c., before me, Alexander Adair, Esq., sheriff of the county aforesaid, by virtue of a certain warrant hereunto annexed, under the hands and seals of James Brown, James Gibbs, and William Morgan, being three of the directors of the Bristol and Exeter Railway Company, established and incorporated by an act of Parliament passed &c., on the oath of Christopher George, &c., good and lawful men of my said county, qualified, according to the laws of this realm, to serve on juries in her Majesty's Courts of Record at Westminster, *notice in writing having been heretofore duly given to Charles Henry Payne, by or on behalf of the said Company, according to the said act*, that the lands, hereditaments, and premises hereinafter mentioned were required by the said

the jury into the Bank of England, as in the recited act directed, the Company should have power to enter &c., [re-enacting s. 47 in terms].

An inquisition was taken under the 6 & 7 Will. 4, within the two years limited by that act. On the 11th of June, 1838, the Company obtained an order of the Court of Exchequer for payment of the purchase-money into the Bank; and on the 21st they paid it in accordingly, the plaintiff not having in the meantime offered to convey:—*Held*, that these proceedings were warranted by the 1 Vict. c. xxvi, s. 14, and might be founded on the inquisition taken under the former act.

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Company for the purposes of the said act, and the said C. H. Payne not having, within the space of twenty-one days and more after the giving of such notice, agreed with the said Company for the sale, conveyance, or release of the said lands, hereditaments, and premises, or of his estate and interest therein; and notice in writing of the time and place at which the jury were required to be returned, having been duly given fourteen days and more before the said 27th day of November, which said C. George, &c., being sworn to inquire of and concerning the matters mentioned in the said warrant, and thereby directed to be inquired of, assessed, and ascertained by them in manner therein mentioned; and the said Company, by their counsel, having, at the time and place aforesaid, appeared before me and the said jurors, and having adduced evidence before me and the said jurors touching the matter in question; and the said C. H. Payne, in the said warrant named, having also appeared, but having declined to adduce any evidence, or otherwise to take part in the proceedings then and there had before me and the said jurors: the said jurors on their oath aforesaid say, that they do assess and give a verdict for the sum of 98*l.* 10*s.*, to be paid to the said C. H. Payne for the purchase of the estate, right, title, and interest of the said C. H. Payne of and in certain arable and pasture ground, portions of certain lands and premises, containing in the whole, by admeasurement, 1*a.* 1*r.* 12*p.*, little more or less, being parts of three certain pieces or parcels of land, situate and being in the parish of Uphill, in the said county of Somerset, distinguished in the map or plan, and book of reference, deposited in the office of the clerk of the peace of the said county, and referred to by the said act, by the numbers 15, 34, and 39, as regards lands in the said parish of Uphill; and of all clay, stone, mines, and minerals, under the same, necessary to be dug or carried away, or used for the purposes of the said act, and found not deeper than

the line of the section in the said act mentioned and referred to, and in the said warrant mentioned, about to be taken and used in execution of certain of the powers granted by the said act: and the said jurors do in like manner assess and give a verdict for the further sum of £58, to be paid to the said C. H. Payne by the said Company, as well by way of satisfaction, recompense, or compensation for the damages which have, before the said 27th day of November, been done to or sustained by the said C. H. Payne, by reason of the execution of any of the works by the said act authorized, as for the damage to be by the said C. H. Payne sustained by reason of the severing or dividing the lands aforesaid: and I the said sheriff do hereby, pursuant to the said act, adjudge and order the several sums of 98*l.* 10*s.* and 58*l.*, making together the sum of 156*l.* 10*s.*, to be paid by the said Company to the said C. H. Payne. In witness, &c."

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The defendants then put in an order, dated 12th June, 1838, for payment of the purchase-money into the Bank of England, pursuant to the 42nd section of the act, application having been on that day made to the Court of Exchequer for that purpose; and proved that on the 21st of June the sum of 156*l.* 10*s.*, the amount awarded to the plaintiff by the jury, was accordingly paid by them into the Bank, to be placed to the account of the Accountant-General of this Court, to the credit of the plaintiff. The engineers of the defendants proved, that, in the language and understanding of scientific men, the *centre* of the railway was the middle point between the two outside rails; and it was admitted that the centre, so defined, was, at the place in question, only 99 yards distant from the line of the railway laid down on the plan deposited with the clerk of the peace, pursuant to the act of Parliament; and that the eastern or extreme boundary of the land, No. 34 on the plan, taken by the Company from the plaintiff, was 125 yards distant from the line on the plan deposited.

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with the clerk of the peace. That portion of the land which was more than 100 yards from the line on the plan, was used for the purpose of making a slope to an embankment. It appeared also, that, in making this deviation, the Company had taken part of a field called Tynings, the property of a Mr. Kniveton, not mentioned in the plan deposited with the clerk of the peace, or in the books of reference thereto.

It was objected on the part of the plaintiff, first, that the inquisition was void, for not setting out all the preliminary proceedings necessary by the act of Parliament to enable the Company to put in force the powers thereby given for the compulsory taking of lands; and particularly that the whole capital had been previously subscribed, as required by s. 242. Secondly, that the Company had no right to enter upon the land in question at all, inasmuch as it was above 100 yards distant from the line of the railway as delineated on the parliamentary plan, whereas the power of the company under the act, to deviate from that line, did not extend to a greater distance than 100 yards, (s. 59). Thirdly, that by the 257th section of the act, the powers of the Company to take lands for the purpose of the railway ceased, (except by consent of the owners), at the expiration of two years from the passing of the act, viz. on the 19th of May, 1838; and that although by the act of 1 Vict. c. xxvi, (which received the royal assent on the 11th of June, 1838), the powers of the former act were extended to things to be done under that act, as if it were thereby re-enacted, yet an inquisition taken under the former act, the powers of which had altogether ceased, could not be made the foundation of compulsory proceedings under the latter; or that if it could, the 14th section of the latter act only enabled the Company to pay the purchase-money into the Bank of England, on the neglect or refusal of the owner of the land to make a good title after the passing of that act; and it could not be said that between the 12th

of June, when the order was made for paying in the purchase-money awarded to the plaintiff, and the 21st, when it was paid in, there could be any such neglect or refusal. Fourthly, that the proceedings were void by reason of the Company having, in making the deviation in question, passed through lands not mentioned in the books of reference, and having so departed from the parliamentary line of the railway. The learned Judge intimated an opinion in favour of the defendants on all these points, and directed a verdict for them, giving the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion, that, on the facts above stated, he was entitled to a verdict. *Erle*, in Michaelmas Term last, obtained a rule accordingly. As to the first point, he cited *R. v. Bagshaw* (a), *R. v. Wilson* (b), *Reg. v. South Holland Drainage Committee* (c), and *Reg. v. Trustees of Swansea Harbour* (d).

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Butt and *Montagu Smith* (with whom was *Bompas*, Serjt.) now shewed cause (e). First, the inquisition is

(a) 7 T. R. 363.

(b) 3 Adol. & Ell. 817; 5 Nev. & M. 164.

(c) 8 Adol. & Ell. 436; 1 Per. & D. 79.

(d) 8 Adol. & Ell. 439; 1 P. & D. 512.

(e) The following are the clauses of the acts of Parliament which were quoted in the course of the argument, and which are material to the case:—

6 & 7 Will. 4, c. xxxvi.—Sect. 5. It shall be lawful for the said company, and they are hereby empowered, to make and maintain the railway and branch railways hereinafter mentioned, with all proper works and conveniences connected therewith, in the line or course,

and upon, across, under, or over the lands delineated on the plan, and described in the book of reference deposited with the respective clerks of the peace for the counties of Somerset and Devon, and for the city and county of the city of Bristol, and the city and county of the city of Exeter, save as herein-after mentioned; that is to say [describing the line].

Sect. 6. And whereas maps or plans and sections, describing the line of the said railway, and the lands upon or through which the said railway is intended to be carried or made, together with books of reference thereto, containing lists of the names of the owners or reputed owners and occupiers of

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good. It sufficiently states the notice to the plaintiff that his land was required for the purposes of the act, and his

such lands, have been deposited with the clerks of the peace for the counties of Somerset and Devon, and for the city and county of the city of Bristol, and the city and county of the city of Exeter, be it therefore enacted, that the said maps or plans, sections, and books of reference so deposited, shall remain with and be kept by the said clerks of the peace respectively; and all persons interested in any manner in such lands shall have liberty, at all reasonable times, to inspect and to make extracts from or copies of the said maps or plans, sections, and books of reference respectively, paying to the clerk of the peace in whose custody the map or plan, section, or book of reference so inspected or referred to may be, for every inspection, the sum of one shilling, and for copies or extracts from the said books of reference, after the rate of sixpence for every 100 words; and the said maps or plans, sections, and books of reference, or true copies thereof, or of so much thereof respectively as shall relate to any matter which may be in question, certified by the said clerks of the peace, or one of them, shall be, and are hereby declared to be, good evidence in all courts of law or elsewhere.

Sect. 8. For the purposes and subject to the provisions and restrictions of this act, the said company, their agents and workmen, and all other persons by them authorized, are hereby empowered to

enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same or any part thereof, and to set out and appropriate for the purposes of this act such parts as they are by this act empowered to take or use, and in or upon such lands to bore, dig, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for the making, maintaining, altering, repairing, or using the said railway or other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of this act; and also for the purposes and according to the provisions and restrictions of this act, to make or construct in, upon, across, under, or over the said railway or other works, or in, upon, across, under, or over any lands, streets, hills, valleys, roads, rail-roads, tram-roads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, *embankments*, aqueducts, bridges, whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches, *cuttings*, and fences; and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-

refusal to treat within twenty-one days: that is all which is rendered necessary by the 25th section, as preliminary

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places, engines, and other buildings, machinery, apparatus, and other works and conveniences, as the said company shall think proper, &c. &c.; and to do and execute all other matters and things necessary or convenient for making, maintaining, altering or repairing, and using the said railway and other works by this act authorized; they, the said company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said company making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained in or by reason of the execution of all or any of the powers hereby granted; and this act shall be sufficient to indemnify the said company, and all other persons, for what they shall do by virtue of the powers hereby granted, subject nevertheless to such provisions and restrictions as are hereinafter mentioned and contained.

Sect. 25. And for settling all differences which may arise between the said company and the several owners and occupiers of, or persons interested in, any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted; be it further enacted, that if any person, corporation, or trustee, so interested

or entitled, and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid; or if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept such purchase-money, &c., as shall be offered by the said company, and shall give notice thereof in writing to the said company within 21 days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury; or if any of such parties as aforesaid shall, for the space of 21 days next after notice in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, *neglect or refuse to treat, or shall not agree with the said company for the sale, conveyance, and release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein; or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or*

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to the proceeding before the sheriff, and it could not be necessary for him to set forth on the face of his inqui-

not, be incapable of making such agreement, conveyance, or release, as shall be necessary or expedient for enabling the said company to take and use such lands, or to proceed in making the said railway and other the works aforesaid; or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest, or charge, which they may claim to be entitled unto or interested in, in case they shall be required to do so by the said company; or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made; then and in every such case the said company shall, and they are hereby required, from time to time to issue a warrant, either under their common seal or under the hands and seals of three at least of the directors of the said company, to the sheriff of the county in which the lands in question shall be situate, or the matter in dispute shall arise, or in case such sheriff, or his under-sheriff, shall be one of the said company, or enjoy any office of trust or profit under them, or shall be in any ways interested in the matter in question, then to any of the coroners of such county not interested as aforesaid, or if all the coroners shall be so interested then to some person then living in the county and free from personal disability, who shall have filled the office of

sheriff or coroner in the said county, and not be interested as aforesaid, (a person having more recently served either office, being always preferred), commanding such sheriff, coroner, or other person, to impanel, summon, and return, and the sheriff, coroner, or other person is hereby accordingly empowered and required to impanel, summon, and return, a jury of at least twenty-four sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in his Majesty's courts of record at Westminster; and the persons so to be impanelled, summoned, and returned, are hereby required to appear before the said sheriff, under-sheriff, coroner, or other person, at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons to be impanelled, summoned, and returned, a jury of twelve men shall be drawn by the said sheriff, &c., or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in his Majesty's courts of record at Westminster are by law directed to be drawn, &c. &c.; and the said sheriff, &c., is hereby empowered and required, on request in writing by either party, to summon before him all persons who shall be thought necessary to be examined as witnesses, touching the matters in question, and may authorize or

sition all that was necessary to give the directors authority to issue the order. All the proceedings taken together

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order the said jury, or any six or more of them, to view the place or matter in controversy; and such jury shall, upon their oaths, or being quakers upon their affirmations, (which oaths and affirmations, as well as the oaths and affirmations of all such persons as shall be called upon to give evidence, the said sheriff, &c., is hereby empowered and required to administer), inquire of and assess and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said company from any other person, and also the sum of money to be paid by way of satisfaction, recompense, or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for the future or temporary or perpetual, or for any recurring damages to be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said company, and which cannot or will not be further obviated, removed, or repaired by them; which satisfaction, recompense, or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff, &c., shall accordingly give judgment for such purchase-money, satisfaction, recompense, or compensation, as shall be assessed by

such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive, to all intents and purposes, upon all persons and corporations whatsoever. Provided always, that in such inquiry, the person or corporation claiming compensation shall be the plaintiff, and shall have all such rights and privileges as plaintiffs in actions at law are entitled to. Provided also, that not less than fourteen days' notice, in writing, of the time and place at which such jury are so required to be returned shall be given by the said company to the party with whom such controversy shall arise, either by delivering such notice to such party, or by leaving the same at his place of abode, or with the clerk, or agent, or principal officer of the corporation, in the case of a corporation, or with some tenant or occupier of the premises intended to be valued, or respecting which or any damages to which any such question shall arise.

Sect. 42.—In case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this act, or for any interest, or for compensation as aforesaid, shall refuse or neglect to accept the same, or to convey the premises or interest in the premises purchased, or shall refuse, neglect, or be unable to make a title to such premises, or to such interest in the premises, to the satisfaction of the said company, or shall be

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are to shew that the Company had a right to take the lands: but the only duty of the sheriff is to inquire into

absent from England, or shall not be conveniently found, or if any party entitled unto or to convey such lands or such interest therein, cannot be conveniently known or discovered, or be not shewn to the satisfaction of the said company to be such party, then and in every such case it shall be lawful for the said company to order the money so agreed or awarded as aforesaid to be paid into the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Exchequer, to be placed to his account, to the credit of the parties interested in the said lands, (describing them so far as the said company can do), subject to the control and disposition of the said Court; which said Court, on the application of any party making claim to such money or any part thereof by petition, is hereby empowered, in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the estate, title, or interest of the party making claim thereunto, and to make such other order in the premises as to the said Court shall seem proper; and the cashier of the Bank of England who shall receive such money is hereby required to give to the said company a receipt for such money, mentioning and specifying therein for what and for whose use (described as aforesaid) the same is received.

Sect. 47. Upon payment or legal tender of such sums of money as *shall have been* agreed upon between the parties, or awarded by a jury in manner aforesaid, for the purchase of any lands, rents, or other charge, or as a compensation for any loss or injury as aforesaid, to the respective proprietors of such lands, or other persons respectively interested and entitled to receive such money or compensation respectively, within three calendar months after the same shall have been so agreed upon or awarded; or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse or be unable from illness to receive such money as aforesaid, or shall refuse or neglect, or be unable to make a good title to such lands, (to the satisfaction of the said company), or if any party entitled unto or to convey such lands shall not be known, or shall die after such agreement or award, or shall be absent from England, or *shall refuse or neglect*, or be unable from illness or otherwise to convey the same, then upon payment of such money into the Bank of England as hereinbefore directed, to the credit of the parties interested in such lands, or in case such money shall have been agreed or awarded to be paid for the purchase of any such lands or such compensation as aforesaid, which any corporation, trustee, or person under disability, is hereby capacitated to convey, upon payment of

their value, and the damage done to them. The verdict and judgment are, indeed, to be binding on all persons,

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such money into the Bank of England as hereinbefore directed, to an account ex parte "The Bristol and Exeter Railway Company," then and in every of such cases it shall be lawful for the said company immediately to enter upon such lands, and thereupon such lands, and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all estate, use, trust, and interest of all parties therein, shall thenceforth be vested in, and become the sole property of the said company, to and for the purposes of this act; and such payment, tender, and conveyance, or such deposit in the Bank of England as aforesaid, shall operate to merge all outstanding or other terms of years, and to bar and destroy all dower and estate tail, and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever of and in the said lands, &c.

Sect. 57. The lands to be taken for the line of the said railway shall not exceed seventy-two yards in breadth, except in those places where a greater breadth shall be judged necessary for carriages to wait, load, or unload, and to turn or pass each other, or for raising embankments for crossing valleys or low grounds, or for cuttings, or for erection and establishment of any fixed or permanent machinery, toll-houses, warehouses, wharfs, or other erections and buildings, except at or near the terminations of the said railway and the branches

thereof, in the respective parishes of Temple, (otherwise Holy Cross), in the city and county of the city of Bristol; Bridgwater, in the county of Somerset; and Tiverton and St. Thomas, in the county of Devon; and except also on commons, downs, or waste grounds, unless with the previous consent in writing of the owners or occupiers of any lands which the said company shall be desirous of appropriating to the obtaining greater space for the purposes hereinbefore mentioned.

Sect. 59. No deviation from the line laid down on the plan so authenticated as aforesaid, between the points marked V. & W. thereon, shall extend to a greater distance than ten yards on either side of such line, nor between the points marked V. & X., and W. & Y., on the said plan, more than twenty yards on the western side of the said line, nor between the points marked Y. & Z. on such plan more than ten yards on the westward side of the said line so laid down, without the previous consent in writing of the owners and occupiers respectively of the lands adjoining the said railway; and that the said company, in making the said railway and other works by this act authorized, shall not deviate from the line delineated on the maps or plans so deposited with the clerks of the peace as hereinbefore mentioned, with or without the consent of the owners or occupiers of the lands or any of them, to a greater distance than 100 yards; nor in

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but merely as to the amount to be paid; they do not change the property, or give a title to the possession of the

passing through any city or town to a greater distance than ten yards from the line so delineated upon the said plans; nor shall any deviation to be made by the said company *extend into the lands* or property of any person whose name is not mentioned in the said book of reference, unless the name of such person shall have been omitted by mistake, and unless the fact that such omission proceeded from mistake shall have been certified in manner hereinbefore provided for in cases of unintentional errors in the said book of reference: provided always, that the said company shall have power to deviate to the extent hereinfore mentioned, and to make such deviation in the section as may be necessary in consequence thereof.

Sect. 235. No proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or be removed by certiorari, &c.

Sect. 242. And whereas the probable expense of making the said railway and the other works hereby authorized will amount to the sum of £1,500,000, and the sum of £750,000 and upwards, or one-half thereof, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for; be it therefore enacted, that the whole of the said sum of £1,500,000

shall be subscribed for in the like manner, before any of the powers given by this act *in relation to the compulsory taking of land* for the purposes of the said railway shall be put in force.

Sect. 243. Provided, that a certificate under the hand and seal of any justice of the peace for either of the respective counties of Somerset and Devon, or for the city and county of the city of Bristol, or the city and county of the city of Exeter, that the whole of the said sum of £1,500,000 hath been subscribed as aforesaid, (and which certificate such justice is hereby authorized and required to grant on application made to him by the said company, and on production of the subscription deed of or relating to the said company), shall for all purposes whatsoever be conclusive evidence that the whole of the sum of £1,500,000 has been subscribed.

Sect. 257. Unless the said company shall, within the space of two years to be computed from the passing of this act, agree for, or cause to be valued and paid for as in this act is mentioned, the lands which they are by this act empowered to take or use, or otherwise so much thereof as shall be by them deemed necessary and proper for the purposes of making the said railway or other works hereby authorized, then and from thenceforth the powers which are hereby granted to them for taking or using such lands shall cease and be utterly void, (save and

land. The jury are not even to ascertain who is the party entitled to receive the money; they are simply to decide upon the amount to be received. Every thing necessary to give the jurisdiction for this purpose is stated in the inquisition. It is said that it ought to state the fact that the whole capital has been subscribed, because, by s. 242, that must be done "before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway shall be put in force." But what is there to make it necessary that this fact should appear on the inquisition? The sheriff is not to adjudicate upon the rights of the parties; it is a mere inquest of office to ascertain the value. [*Parke, B.*—The question is, whether

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except with the consent in writing of the owners and occupiers thereof respectively).

1 Vict. c. xxvi.—Sect. 1. All the powers, authorities, provisions, &c. &c., clauses, matters, and things contained in the said recited act (6 & 7 Will. 4, c. xxxvi) (except such parts thereof respectively as are by this act repealed, altered, or otherwise provided for) shall extend and be construed to extend to this act, and to the several works and things hereby authorized or required to be made and done, and shall operate and be in force in respect to the purposes and objects of this act, and of the said recited act as altered and amended by this act, as fully and effectually to all intents and purposes whatsoever, as if the same powers, authorities, provisions &c., were repeated and re-enacted in this act.

Sect. 2. [Recites and repeals so much of the 47th section of the 6 & 7 Will. 4, as is above set forth.]

Sect. 12. The time by the said

recited act limited for the taking or using of lands for the purpose of the said undertaking thereby authorized, shall be and the same is hereby revived, and extended and enlarged for the further term of three years, to be computed from the expiration of the time in such act mentioned.

Sect. 14. Upon payment or legal tender of such sums of money as *shall have been* agreed upon between the parties, or awarded by a jury in manner in the said recited act mentioned, for the purchase of any lands, &c. &c., or if any party entitled unto or to convey such lands shall not be known, &c., or shall refuse, neglect, or be unable from any cause to convey the same, then upon payment of such money into the Bank of England as in the said recited act directed, &c., it shall be lawful for the said Company immediately to enter upon such lands, &c. &c., [proceeding to re-enact s. 47 of the former act, with an additional proviso].

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it is not enough to state in the inquisition all that is required by the section relating to the inquisition; and whether, if there have been a non-compliance with the act by the non-payment of the capital, that should not have come by way of answer from the plaintiff.] It may also be answered, that at all events the statement is mere matter of form,—merely a sort of preface to shew that the sheriff is acting within his jurisdiction; and if so, the want of it is cured by s. 235. The cases furnish no authority for the plaintiff on this point. In *Rex v. Bagshaw* (a), there was an *order* (of trustees of a turnpike road for diverting a road) as well as an inquisition; and these were quashed, because, on the proceedings taken altogether, there appeared to be no jurisdiction. In *Rex v. Mayor of Liverpool* (b), the notice required before the proceeding by inquisition, was not in fact given. [Parke, B.—There is in that case the opinion of Lord Mansfield, that the notice ought to have appeared upon the inquisition: but in fact there was no notice there.] In *Rex v. Trustees of Norwich v. Watton Roads* (c), the Court appeared to think the inquisition bad, because it did not set out that the parties had been served with notices to treat, although there was no decision on the point. Here, however, the inquisition does set out that fact. The case of *Reg. v. South Holland Drainage Committee* (d) admits of the same answer. There the Court refused a certiorari to bring up the inquisition, on the ground that the party had waived the notice rendered necessary by the act of Parliament; and all that was said as to the necessity of its appearing on the face of the inquisition is therefore extra-judicial. Again, in the case of *Reg. v. Trustees of Swansea Harbour* (e), the point was not decided, the Court holding that such an objection could not be insisted on by the trustees, whose

(a) 7 T. R. 363.

P. 32.

(b) 4 Burr. 2244.

(d) 8 Adol. & Ell. 429.

(c) 5 Adol. & Ell. 563; 1 N. &

(e) Id. 439.

duty it was to give the notice: and the judgment of *Lit-
tledale, J.*, would rather go to shew that the statement was
unnecessary altogether. [*Parke, B.*—I see the sheriff is
to give a judgment; therefore every thing necessary to give
him jurisdiction should appear on the inquisition and judg-
ment, or some part of it.] It does so. It is not a judgment
to bind any right, or give any title; it is only a judgment
on the inquisition, which is merely as to value. This is but
a step in the proceedings; as such, it is perfect on the face
of it, inasmuch as it shews that the matters rendered neces-
sary preliminaries by the 25th section, had been done.

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Secondly, with regard to the question as to the *devia-
tion*, which depends upon the construction of the 57th
and 59th sections of the act. S. 57 limits the breadth
of the lands to be taken for *the line* of the railway, except
in those places where a greater breadth shall be judged
necessary for carriages to wait, load or unload, &c., &c.,
and except with consent of the owners, to twenty-two
yards. Then s. 59 enacts, that "no deviation from *the
line* laid down in the plan" to be deposited with the clerk
of the peace, shall extend, within certain points mentioned,
to a greater distance than ten yards "on *either side* of
such line:" and that the Company, in making the railway
and other works authorized by the act, shall not *deviate
from the line* delineated on the plan, with or without con-
sent, to a greater distance than 100 yards. The effect
of that clause is merely to substitute the deviated line for
the original line, with the same powers, with respect to
the making of cuttings, embankments, &c., as belonged,
by s. 8, to the original line. The admeasurement of the
100 yards is to be from "the line delineated on the plan,"
i. e. the line of passage of the railway itself: there is
nothing on the plan to shew the cuttings or embankments.
Measuring from that point, the substituted line is within
the 100 yards. The Company have power to make such
deviation *in the section* as may be necessary in consequence

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of the deviation of the line: it is clear, therefore, that it is not to be a mere surface measurement. There is no *deviation*—no change *de viâ*—by merely extending the cuttings.

Thirdly, the objection that some other land has been taken for the deviation which is not within the act, cannot avail the plaintiff. [*Parke, B.*—The answer is, that you have agreed with the owner. What have the rest of the world to do with it? You cannot take compulsorily land not mentioned in the plan; but that does not prevent you from taking by agreement lands not mentioned, if the deviation be within the 100 yards.]

Fourthly, it is objected that the powers of the 6 & 7 Will. 4, had ceased, and were not properly revived at the time when this land was taken. The first section of the 1 Vict. c. xxvi, incorporates into it all the powers, authorities, clauses, &c., of the former act, as fully as if they were repeated and re-enacted therein. Then s. 14 enacts, that on payment or tender of such sums of money as *shall have been* agreed upon, or awarded by a jury, for the purchase of lands, or, if (*inter alia*) the parties shall refuse, neglect, or be unable to convey the same, then upon payment of such money into the Bank of England, *as in the recited act directed*, it shall be lawful for the Company to enter upon the lands. Here, at the time when the first act expired, nothing remained to be done but the payment of the money into the Bank, which was done, after the passing of the second act, in the manner directed by the first act, and was therefore well done under the provisions of s. 14.

Erle, Crowder, and Fitzherbert, contra.—First, as to the question of deviation, which is one of very great importance. Hitherto all persons have supposed that they would have notice before their lands were taken for the purposes of the railway, but by the construction the Court

is called upon by the other side to adopt, it may happen that although the deviation of the actual line of the railway is but ninety-nine yards, the lands of a person 100 yards further off may be taken for a cutting. [*Parke, B.*— If they be mentioned in the plan and books of reference; there is no compulsory power except over them.] The plaintiff contends that the *deviation* in s. 59, means a deviation in taking lands as well as in making the line of railway. The “lands to be taken for the line” of the railway, in s. 57, clearly mean the lands to be taken for cuttings, &c., as well as for the railroad itself. It is to be of the breadth of twenty-two yards only when on a perfect plane, but a greater breadth is allowed in the case of embankments, cuttings, &c. &c. The *line*, therefore, here means the twenty-two yards or greater necessary breadth. Then s. 59 provides, that no deviation from the *line* laid down on the plan, between certain points, shall extend to a greater distance than ten yards on either *side* of such line. There, again, the line means the twenty-two yards, from the side of which the measurement is to be. It then goes on to enact, that the Company, in making the railway *and other works* authorized by the act, shall not deviate from the line delineated on the plan above 100 yards; nor shall any deviation “*extend into the lands*” of any person not mentioned in the book of reference, unless omitted by mistake. Here the language corresponds with the expression in s. 57, as to the “lands to be taken for the line,” and shews that the *deviation* means the whole extent to which the lands are to be taken. The object of all these clauses is to protect the landowners, and they ought to be so construed as to effectuate that object. Suppose a party has a field within the 100 yards, and therefore his name and that of the field is mentioned in the book of reference, but he has also other land several fields off, can the Company take that for cuttings? Such is the consequence of the construction contended for on the other

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side. It is submitted, however, that the proper construction is, in measuring the 100 yards, to place the deviated as well as the parliamentary line on perfectly level ground, and to exclude from consideration all discretionary additions. The inconvenience of the contrary construction will be more apparent in the case of a town, where only ten yards' deviation is allowed, but forty or fifty might be required for cuttings.

Secondly, it is admitted that the inquisition must shew jurisdiction; but it is said that the jurisdiction is to be assumed as to matters required by other sections of the statute, until it be negatived. [*Parke, B.*—There are cases to shew that an excuse mentioned in a proviso need not be noticed in a conviction. Here s. 242 is in the nature of a proviso, cutting down all the compulsory powers previously given.] It is not in the form of a proviso; it is rather a preliminary to all the compulsory clauses.

Thirdly, as to the operation of the two acts of Parliament taken together. There was a chasm between the acts, from the 19th of May to the 11th of June, during which period all the compulsory powers were gone. The inquisition was held while the first act was in force: but something yet remained to be done before the defendants could acquire title; viz. the payment into the Bank of England under s. 47, which is to be upon a *refusal* or *neglect* to convey. The first act expired before the application was made for that purpose: the question is, did the subsequent act revive it for this purpose? S. 1 merely incorporates the clauses of the former act, as if re-enacted from that time; s. 2 repeals that part of s. 47, which gave the title on payment of the money, and s. 14 re-enacts it with an additional proviso; but it cannot be said to *revive* it as to past transactions. The payment into the Bank is to be made "*in the manner* in the recited act mentioned," but not *under* the old act. Then s. 12 *revives* and extends *the time* for taking or using lands, for the further

term of three years from the expiration of the time mentioned in the 6 & 7 Will. 4; but it has no words giving a continuing validity to proceedings had under the former act. [Parke, B.—Sect. 14 may be read so as to embrace all valuations under former inquisitions: the words “*shall have been agreed upon or awarded*,” were probably introduced for that very purpose. Why should the Company go through the expensive form of a new inquisition?] The effect of the repeal of an act of Parliament is completely to obliterate it, as if it had never passed, except as to transactions completely carried into effect; *Key v. Goodwin* (a), *Surtees v. Ellison* (b). Then, are those words in the 14th section sufficient to revive that which has become wholly nugatory and void? Moreover, the subsequent words are, “if any party *shall* refuse, neglect,” &c., not “shall have refused or neglected.” Here the order which was the foundation of the payment was not obtained until the 12th of June, there was therefore no neglect or refusal under the new act.

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The last point, as to the effect of passing through Kniveton's land, is included within the first, if the construction of the act contended for by the plaintiff be the correct one.

PARKE, B.—It seems to me that this rule ought to be discharged. The first question which has been made in this case is, whether the inquisition was sufficient.

Now it must be admitted, according to the authorities on this subject, that inasmuch as there is to be an extraordinary jurisdiction exercised by the sheriff, in giving judgment as to the amount of compensation, every thing that was made preliminary by the act of Parliament ought to be set out on the face of the inquisition. The question is, whether all that the act makes necessary is set out on the

(a) 6 Bing. 576.

(b) 9 B. & C. 750; 2 Man. & R. 586.

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face of the inquisition, at the foot of which is the sheriff's judgment. It seems to me that it is. All that the act requires in the first instance, is to be found in the 25th section; and it appears to me that every thing which that section makes necessary has been duly set out on the face of the inquisition. The only question is, whether what is made necessary by the 242nd section ought to have been set out: and it seems to me that that section, although it is not in the terms of a proviso, is in substance a defeasance of all the powers given by the act of Parliament to enable the Company to take compulsory possession of lands, and that this, so coming by way of defeasance, would be an answer, and ought to come from the other side, and need not be set out on the face of the inquisition and judgment. It is perfectly well settled, that every thing that comes in reality by way of proviso and defeasance, need not be inserted in a conviction, but must come by way of defence. In this case we think it was incumbent on Mr. Payne, in order to do away with the effect of the inquisition, and to prevent the Company from acting on it, to have shewn on his part that the £1,500,000 had not been subscribed.

The next and important question in this case is, whether the Company were authorized to make a deviation in the direction in which the deviation in question was made. It appears on the evidence on the cause, that the new railroad was within 100 yards of what would have been the centre of the rails of the old parliamentary railroad, but that the cuttings went considerably beyond the 100 yards. The question is, whether the Company were authorized to make these cuttings beyond the 100 yards; and it appears to me clearly that they were.

In order to decide that question, we must refer to the different sections in the act of Parliament which give the Company the power of making the railroad, and the power of deviating. [His Lordship read the 5th section of the 6 & 7 Will. 4, c. xxxvi.] If the act of Parliament had

stood there, and there had been no permission given to make any deviation, and there had been no restriction as to the width of the railway, the Company would have been bound to make the railroad precisely in the mode pointed out in the parliamentary plan, of a convenient and reasonable width. But the 57th section then restricts the width which they are not to exceed, but they may have any width they please within those limits. [His Lordship read s. 57.] That would have empowered the Company to make a railroad twenty-two yards in width, if they pleased; and, in applying the parliamentary line to the road, they must have taken it along the centre of the twenty-two yards, and having fixed the line in which it was to go, they might have a railroad of the width of twenty-two yards on the plane, and then would be authorized to make, beyond that space, embankments and cuttings reasonable and necessary according to the nature of the soil, and toll-houses, warehouses, wharfs, and places for the carriages to stand or turn.

Now comes the 59th section, on which this question turns. [His Lordship read that section.] It appears to me that the true construction of that clause is, that the Company may make a railroad in a new line, which new line shall be on a line to be laid down, not exceeding 100 yards from the old line. I feel no doubt or difficulty about it; and any other construction would lead to very great inconvenience. It is the same as if they were authorized to alter the parliamentary plan in that way, and to make a new road in the altered direction. The proper mode of comparing the old line and the new line, would be this: supposing you laid down on the surface of the ground a thin piece of string or tape, the thinner the better, exactly in the line originally authorized by the act of Parliament, (which would be, I take it, in the centre of the twenty-two yards), you may then lay down a new tape, at a distance not exceeding 100 yards

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from the old tape, and may make the substituted rail-road in that direction: that being so, you have all the powers in respect to the new line as you had with respect to the old line; you may make all the cuttings or embankments reasonable and proper, and all the erections and buildings necessary for this new line, just as if the new line had been inserted in the parliamentary plan, at a distance of 100 yards from the former. It follows from this, that the measurement is to be a horizontal measurement from the one to the other, that is, it is to be according to the base.

It is said, however, that this is a great hardship on the proprietors of lands, for they have no notice of the intention of the legislature to give such powers to the Company. But the proprietors of lands are bound to construe the act according to its true meaning; if then this be the true construction of the act, they are required to take notice of that true construction. It is said, this would be a great hardship on persons whose names are not inserted in the book of reference, and would enable the Company to make slopes, and erect their works, out of the proper places entered in the book. But it appears to me that that by no means follows from the position we have laid down, but that it would be incompetent to the Company, in making their new line, to trespass at all on the lands of persons, without their consent, whose names were not contained in the books of reference; because they are to exercise, with respect to the new line, all the powers they had as to the old line; that is, they may make, with respect to the new line, all proper works and conveniences "in, under, and over the lands delineated in the plan, and described in the books of reference." Therefore, they cannot make, without the consent of the owners, any works, except upon lands which are specified in the books of reference, and delineated on the plan. It seems to me, therefore, that if any other construction than this were to

be put upon the act of Parliament, it would be productive of great uncertainty and inconvenience; because it is impossible to tell, before they have cut the railroad, and have got it at the proper level, what will be the degree of slope that will be required for it; that must depend entirely on the nature of the strata through which the railroad is made: and if the powers of the Company were to depend on what might turn out to be the length of the slope required, it would be impossible to work with a certainty of being within the powers given by the act of Parliament. It appears to me, therefore, that the principal objection in this case is disposed of.

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Then there is another objection, that the railroad was made over the lands of a Mr. Kniveton, whose name is not mentioned in the books of reference, nor in the plan, with reference to this particular property. It seems to me that that is no objection. The 59th section provides, that the deviation shall not be made through any land not mentioned in the books of reference; and if this deviation, that is, the new line which the Company are authorized to make, have trespassed on Mr. Kniveton's lands, it would be unauthorized by the act of Parliament, and that, probably, whether with or without the consent of Mr. Kniveton; because, for the benefit of all persons, landowners and all others interested in the railroad, it is provided that it shall not deviate beyond the 100 yards, with or without the consent of any one. But the line of deviation in the new railroad does not go upon his land, though some of the slopes necessary to make that line extend into it. With respect to that, Mr. Kniveton alone has to complain; and if he give his consent, it is no objection on the part of any other person interested in the railroad.

That disposes of all the objections in the case, except the last. Now the last objection is, that the inquisition was taken under the old act of Parliament, which expired,

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in consequence of the operation of the 257th section, on the 19th of May, 1838.

In this case, the inquisition was held within the two years, but the payment into the Bank of England did not take place until after the expiration of that period. At that time, there is no doubt that, under the act of the 6 & 7 Will. 4, the Company had no power to enter upon the lands in question. The question then is, to what extent are the powers of that act revived by the statute of 1 Vict. c. xxvi? The first clause, which incorporates the provisions of the old act with respect to the works to be done under the new act, does not appear to me to bear upon this question : but I think, on the proper construction of the 14th section, power is given to the Company to act upon the findings of the jury, on inquisitions taken under the former act. It appears to me to have been the intention of the legislature to give effect to all the inquisitions that had been taken under the old act. [His Lordship read s. 14.] Now it seems to me that that clause enables the Company to proceed on an old inquisition, acting, as to all future steps, in the manner directed by the 14th section ; and they could not have paid the money into the Bank of England, unless there had been a refusal or neglect to make out a title, according to the provisions of the former act, and according to the provisions of this 14th section. It becomes, therefore, a short question of fact, whether there was in this case, on the part of Mr. Payne, any neglect to make out a good title to such lands to the satisfaction of the Company. Now the facts are, that this act of Parliament came into operation on the 11th of June, and that upon the 12th of June, an application was made to the Court of Exchequer for an order to pay in the money ; and on the 21st of June, the money was paid in. Now the question is, whether there was in this case reasonable evidence to go to the jury ; if there was, all the points in the case being referred to us, we are to decide as

if we were in the place of the jury. The Company had to shew that there was neglect between the 11th of June and the 21st, and not between the 11th and 12th, when the order was obtained by the Company provisionally, in order thereafter to pay the money; if they pay the money within two months after the neglect or refusal—if there has been a sufficient neglect or refusal to make out a title—they are entitled to proceed under this act of Parliament. The question therefore is, not whether there was a sufficient time between the 11th and 12th of June, when the order was obtained, but between the 11th and the 21st of June, when the money was paid into Court, to see if Mr. Payne had been guilty of neglect in not making out his title. Can there be the least doubt of that? It is clear Mr. Payne meant to keep the Company at arm's length, and do nothing. The neglect to make out a title for ten days, after he knew what had taken place, was amply sufficient to justify the Company in paying the money into Court. It seems to me, therefore, that on this last objection also, the defendants are entitled to succeed, and consequently that the rule ought to be discharged.

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ALDERSON, B.—I am of the same opinion. It appears to me that the defendants are entitled, on all the points in the case, to retain their verdict.

.With respect to the deviation, which seems to be the principal point on which the opinion of the Court was sought to be obtained, as a guide for the construction of acts of Parliament of this kind in future, it appears to me, I own, to be a very simple question. In the parliamentary plan a line is laid down, and a certain deviation from that line is permitted to take place. The parliamentary plan is to be the guide for persons taking it in their hands, to know in what direction the railroad is to go across the face of the country. What is "the line" laid down in the parliamentary plan? What

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line across the face of the country does it represent? It appears to me that it represents the medium filum viæ of the railway which is to be thereafter made; and the deviation which is to be allowed is to be a deviation between the medium filum viæ of the railway, as described by the parliamentary plan, and the medium filum viæ of the railway which is ultimately to be laid down; and if between these two corresponding points an interval of not more than 100 yards exists, measured in a horizontal level, the deviation does not exceed that which is allowed by the act of Parliament to be made. That appears to me to be a correct definition of the deviation allowed by the 59th section of the act; and if that be so, according to the evidence in this case, the distance between the two lines does not exceed the limit which the act of Parliament has provided.

But it is suggested to us that the word "deviation" cannot have this sense, and cannot mean the interval between the two media fila viæ, by reason of the words in the same clause, which provide that "the deviation shall not extend into" lands not mentioned in the books of reference. I perfectly agree that *the deviation* cannot extend into lands not mentioned in the books of reference; and inasmuch as this is a parliamentary bargain between the public (including the railway proprietors) on the one side, and individuals on the other, I agree that it must be faithfully and correctly performed, and there can be no deviation at all into lands not mentioned or defined by the act of Parliament; for, although the parties themselves might permit the Company to go over some of their lands, yet other people have an interest not to allow it. But this provision, as it appears to me, does not extend to more than *the line of railway*—it does not extend to slopes and embankments. The railway itself can go only to a certain distance from the original line, and when it does not exceed that distance, it can be of no importance to the parties through whose lands it

passes, whether the lands of other people be taken for slopes or embankments, provided they be taken with their consent; they cannot be taken without. It therefore appears to me, if the line of deviation does not go into lands not contained in the books of reference, it is competent for the Company to proceed with their slopes and embankments in other lands, provided they have the consent of the parties to whom those lands belong, and not without.

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I am of opinion, therefore, that this first objection fails: with respect to the others, I shall not say much about them, as they appear to have been already fully gone into by my Brother *Parke*. The last objection, as to the operation of the two acts of Parliament, cannot prevail. There can be no doubt that the provisions of the 14th section were framed for the express purpose of having reference to antecedent inquisitions, which had been taken under the former act. Then all the rest is a question for the jury; and when we look at all the circumstances of this case, can we doubt that the jury, properly directed, would have found that this party had refused or was unable to complete his title to the satisfaction of the Company? in which case the Company have a right to pay the money into the Bank, and give themselves a good title.

GURNEY, B.—I entirely concur with my learned Brothers in every respect as to which they have given judgment, and I should only be repeating in worse language that which they have said, were I to say more.

ROLFE, B.—I did not hear the first part of the argument; what I did hear induces me come to the same opinion as the rest of the Court.

Rule discharged.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

PICKARD v. THE ATTORNEY-GENERAL.

A testator devised real estate to W. T. for life, with remainder to his first and other sons in tail, with remainder to T. P. for life, remainder to his first and other sons in tail, remainder to G. P. for life, with remainders over; and gave a power to the several persons who, by virtue of the limitations in the will, should be in actual possession of the estates, by deed or will to appoint to any woman or women they should marry, by way of jointure, rent charges not exceeding £750 per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. W. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with £750 per annum by way of jointure to his wife, under the power, and died without issue male, whereupon G. P. entered into possession:—*Held*, on error brought on the judgment of the Court of Exchequer, that G. P. was chargeable with legacy duty after the rate of £10 per cent. on the value of the rent-charge of £750 per annum, affirming the judgment of the Court below.

A WRIT of error having been brought on the judgment of the Court of Exchequer in this case (a), it was now argued by

Erle, for the plaintiff in error; and by *Waddington*, for the defendant in error: but the arguments being substantially the same as those which were urged in the Court below, it has been thought unnecessary to detail them at length.

The judgment of the Court was delivered by

LORD DENMAN, C. J.—We are all agreed in this case that the judgment given in the Court below is correct, and must be affirmed. The case states the bequest by the will of Mr. Trenchard to the Rev. George Pickard, of an estate for life, with a proviso that it should be lawful for the several persons who for the time being should, by virtue of any of the limitations thereinbefore contained, be in the actual possession, or entitled to the rents, issues, and profits, during life, by deed or will, to grant an annual sum

ing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. W. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with £750 per annum by way of jointure to his wife, under the power, and died without issue male, whereupon G. P. entered into possession:—*Held*, on error brought on the judgment of the Court of Exchequer, that G. P. was chargeable with legacy duty after the rate of £10 per cent. on the value of the rent-charge of £750 per annum, affirming the judgment of the Court below.

or annuity to his wife, not exceeding in the whole the sums thereafter mentioned. Then it appears that Thomas Pickard became possessed as tenant for life; and that by his will, he made a charge in favour of the lady therein mentioned by way of annuity; that annuity has been estimated at a sum, upon which the Crown is entitled to the highest duty, if the legacy is liable to charge. Now it appears to me, in the first place, that the mere statement of that state of things is enough to shew that this is a legacy left by the will of John Trenchard. By that will, he creates the power of granting an annuity; that annuity is afterwards granted, whether by will or deed is immaterial, and it is the operation of the will creating the annuity that is to be considered. The 4th section of the statute 45 Geo. 3, provides, in clear terms, "that every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act,"—referring, at that moment, to the will that should execute the power, and not the will that created it; but that is only the mode of stating what constitutes a legacy, and in this case it is clearly a legacy under the one will or the other. It is a legacy under the later will in fact, but in operation of law it is a legacy under the other will; and the question is, in what character it is to pay the duty? I am of opinion that it derives its legal character out of the original will, and not

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the engrafted will. Then a proviso follows:—"That nothing herein contained shall be construed to extend to the charging with the duties by this act granted, any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement, or deed or deeds." Now the meaning of that proviso appears to me quite consistent with the view we are taking of this case; where the charge is not by will, but by deed, then the act has said that it shall not be considered as a *legacy*; it is a *gift* by a marriage settlement. That is quite consistent with the general principle, that where the interest grows out of the will creating the power, it shall be referred to that will, and not to the will afterwards made in pursuance of the power. I admit we must go the length of saying, that if the power is executed by deed, the charge is liable to the duty, as well as where it is executed, and the annuity given, by a will; and not shrinking from that consequence, it seems to me that we are bound by the principle disclosed in this proviso, to refer the liability to duty to the question what is, in legal operation, the instrument by which the charge is made; and, upon that, there is no doubt whatever in my mind, that the charge is made by the original will, and not by that which is accidentally a will, and not a deed, by which the original intention is carried into effect. For these reasons, we are of opinion that the judgment of the Court below is correct, and must be affirmed.

Judgment affirmed.

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RHODES v. SMETHURST.

A WRIT of error having been brought from the judgment of the Court of Exchequer (a) in this case, it was argued in Michaelmas Vacation by Sir *W. W. Follett* for the plaintiff. The arguments were in substance the same as those urged by him in the Court below; the main position contended for on behalf of the plaintiff being, not that the case fell within the words or the equity of the 7th section of the 21 Jac. 1, c. 16, or within the 4 Anne, c. 16, s. 18; but that the 3rd section of the statute of James did not apply at all to a case where there was not a continuing right to bring the action during the six years. Besides the cases cited in the Court below, the following were referred to: *Chandler v. Vilett* (b), *Matthews v. Philips* (c), *Middleton v. Forbes* (d).

It is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted.

At the conclusion of the argument for the plaintiff, the Court intimated to *Whitehurst*, who appeared for the defendant, that they would hear him on a future day, if they considered it necessary to do so. And now, without calling upon the defendant,

Lord DENMAN, C. J., gave judgment.—This was an action upon a promissory note for £2500 made by the intestate James Hobson, payable to the plaintiff on demand, with the usual money counts.

To the count on the note the defendant pleaded, *inter alia*, the Statute of Limitations.

The plaintiff replied, that the cause of action accrued within six years before the death of James Hobson, and shewed further, that, in consequence of litigation in the Ecclesiastical Courts, no administration to his effects was granted till the 18th of June, 1835, and that the plaintiff

(a) 4 M. & W. 42.

(c) 2 Salk. 424.

(b) 2 Saund. 120.

(d) Willes, 259, note (c).

Esch. Chamber, commenced his action within a reasonable time afterwards,
1840. viz. on the 12th of September, 1835; and averred, that
RHODES the periods which elapsed between the accruing of the
v. cause of action and the death of James Hobson, and be-
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the commencement of the suit, did not together amount
to six years.

The defendant rejoined, that the causes of action did not accrue within six years before the death of James Hobson.

A verdict having passed for the plaintiff, the Court of Exchequer gave judgment, notwithstanding the verdict, for the defendant.

A writ of error having been brought in this Court, we have heard the case argued on behalf of the plaintiff.

The question was said to turn upon the 3rd section of the stat. 21 Jac. 1, c. 16, by which it is enacted, "that all actions of trespass quare clausum fregit, &c., all actions of account and upon the case, &c., shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case (other than for slander) within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after." And it was contended by the plaintiff's counsel, that the six years mentioned in the statute could not be considered as having elapsed, unless there had been a continuing cause of action capable of being enforced; in other words, a plaintiff capable of suing and a defendant liable to be sued, during the whole of the six years.

It was admitted, that with reference to the disabilities mentioned in the 7th section of the statute, if the time of limitation had once begun to run, it would continue to run on, notwithstanding any subsequent disability; but it was maintained that with reference to the 3rd section of the statute the case was different.

It was not alleged that any decision of our Courts of law could be produced in support of the proposition contended for; but cases were cited to shew that, in reference to various clauses of the statute, the Courts had adopted an equitable rather than a literal construction of the act. *Chandler v. Vilett* (a) was referred to, which decided that an action of assumpsit was within the meaning of the proviso in the 7th section of the statute, though not specifically mentioned. *Matthews v. Philips* (b), *Wilcox v. Huggins* (c), *Middleton v. Forbes* (d), were cited. This class of cases are stated, in Willes 29, to have been adjudged upon the equity of that clause of the statute of James (sect. 4) which gives a year after judgments or outlawries reversed, for the bringing of a new action. In these cases actions had been commenced within the six years, and abated by matters subsequent, and in such cases a new action has been allowed to be brought within a reasonable time after the determination of the first.

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The case of *Douglas v. Forrest* (e) was also cited. In that case the debtor resided and died abroad. His death occurred in 1817. Probate was not taken out till 1824, and within six years after the creditor brought his action, and the question was, whether he was entitled to maintain it within the equity of the proviso in the 19th section of the 4th Anne, c. 16, by which, in the case of debtors residing abroad, the right to sue is reserved to the creditor, provided he sues within the limited period after the debtor's return from abroad. The Court held the action maintainable, notwithstanding this lapse of time, and although the debtor never returned from abroad.

None of these cases were decisions upon the section now in question—they are but illustrations of a principle which

(a) 2 Saund. 120.

(b) 2 Salk. 424.

(c) Fitzgib. 171, 289.

(d) Willes, 259, note (c).

(e) 4 Bing. 686.

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does not admit of controversy, that Judges will expound a case within the mischief and cause of an act, to be within the statute by equity, if it be not within the words: Com. Dig. Tit. Parl. R. 13, Co. Lit. 24. b.: but the question still remains to be decided in each particular case, what the intent of the act is, and whether the proposed case, though not within the words, is yet within the meaning and reason of the act.

In addition to the cases at law, three cases from courts of equity were cited: *Jolliffe v. Pitt* (a), *Webster v. Webster* (b), *Perry v. Jenkins* (c).

In the case of *Jolliffe v. Pitt*, the decision does not appear; it is only said that the Chancellor inclined to be of opinion that the Statute of Limitations was not to take effect.

In *Webster v. Webster*, a bill was filed by the executor of a creditor against the executor of the debtor. The debtor died in 1786, the creditor in 1792. The will was not proved till 1802. The bill prayed for an account and payment. The defendant put in a plea of the Statute of Limitations. It is said that the Chancellor objected, that, as there was no representation till 1802, there was no person who could be sued, and therefore the statute could not be pleaded.

No decision, however, was come to on the point, and ultimately the plea was, under the circumstances of the case, allowed.

In *Perry v. Jenkins*, the question arose on a bill of revivor. The original bill was filed by Griffith Jenkins against Lewis Jenkins in 1818. In 1819 Griffith Jenkins died, leaving Ann Jenkins his widow. In 1827, Lewis Jenkins, the original defendant, died. In 1830, Ann, the widow, married one Perry; subsequent to this marriage, administration was taken out by Mrs. Perry to the estate

(a) 2 Vern. 694.

(b) 10 Ves. 93.

(c) 1 Myl. & Cr. 118.

of the original plaintiff, Griffith Jenkins, and in 1835, the bill of revivor was brought against the real and personal representatives of Lewis Jenkins, the original defendant.

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To this bill a plea of the Statute of Limitations having been put in, it was overruled, on the ground that the Statute of Limitations did not begin to run till administration was taken out. The right to revive the bill never had existed in the deceased Griffith Jenkins: it was a right first accruing to his personal representative; and on that ground the case of *Murray v. The East India Company* (a) was said to be a conclusive authority against the plea.

It appears from this examination, that the cases in equity do not (any more than those at law) furnish any authority for the proposition contended for by the plaintiff in this case.

If from the cases we turn to the statute, we see nothing in the words of the clause in question which points to the necessity of a continuing cause of action, capable of being enforced during the whole period of six years. The words are, that the action shall be brought within three years after the end of the then session of Parliament, or within six years next after the cause of such action or suit, and not after. These words, in their natural sense, import what is more precisely expressed in the 7th section of the same statute, by the words "the time of any such cause of action *given or accrued, fallen or to come.*"

It was said in argument, that no laches can be imputed to the plaintiff for not suing during that portion of time during which there was no person whom he could sue, and therefore that period of time ought to be excluded from calculation, by an equitable extension of the terms of the act.

This argument might be entitled to some weight, if the clause in question had had for its object the remedying of some inconvenience under which plaintiffs suffered, in

(a) 5 B. & Ald. 204.

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which case it might be extended by construction to reach a case not within the words, but within the mischief intended to be remedied. But the object of this act is quite different; it was passed for the benefit of defendants, to exempt them from being called to account in respect of transactions long gone by, which it might not be easy to explain at a distance of time. This object would be liable to be, in many cases, defeated, if we were to adopt the construction contended for by the plaintiff; the time of limitation might be indefinitely prolonged, and we should be extending a statute by equity, not to forward, but to defeat, the remedy which the act had in view.

The case of *Prideaux v. Webber (a)*, in which the statute was held to run, though the Courts of law were shut in consequence of the rebellion, shews that this clause of the act is to be construed strictly against plaintiffs; and the act of 1 Will. & M. c. 4, by which it was enacted, that from the 10th of December until the 12th of March, 1688, shall not be accounted any part of the time within which any person, by virtue of the Statute of Limitations, must bring his action, is in accordance with this view of the law.

We think, therefore, that the observations of Lord *Kenyon*, in the case of *Doe d. Durore v. Jones (b)*, with reference to the statute of fines, furnish the proper rule for the construction of the statute of James, and for the 8rd equally with the 7th section of that act:—"I never heard it doubted," said Lord *Kenyon*, "till the discussion of this case, whether, when any of the statutes of limitation had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am clearly of opinion, on the words of the statute of fines, on the uniform construction of all the

(a) 1 Lev. 31.

(b) 4 T. R. 300.

statutes of limitation down to the present moment, and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed."

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Our opinion therefore is, that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

MEMORANDA.

IN this vacation, *George James Turner*, Esq., of Lincoln's Inn; *Robert Baynes Armstrong*, Esq., and *David Dundas*, Esq., of the Inner Temple; and *Richard Bethell*, Esq., of the Middle Temple; were appointed her Majesty's Counsel.

In the same vacation, *James Manning*, Esq., of Lincoln's Inn; *John Halcomb*, Esq., *William Fry Channell*, Esq., and *William Shee*, Esq., of the Inner Temple; and *Digby Cayley Wrangham*, Esq., of Gray's Inn; were called to the degree of the coif, and gave rings with the motto, "*Honos nomenque manebunt.*"

Serjeants *Adams*, *Andrews*, *Storks*, *Ludlow*, *Bompas*, *Goulburn*, and *Talfourd*, received patents of precedency, conferring upon them the same rank which they held under the warrant of King William the Fourth, held by the Privy Council to be void.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

EASTER TERM, 3 VICTORIÆ.

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CORNFOOT v. Sir F. G. FOWKE, Bart.

Assumpsit for the non-performance of an agreement to take a ready-furnished house. Plea, that the plaintiff caused and procured the defendant to enter into the

THIS was an action upon a written agreement, dated the 12th of November, 1838, made between the plaintiff and the defendant, whereby the defendant agreed to take a ready-furnished house of the plaintiff, for the term of two years, at the rent of £375 per annum, but which the defendant had refused to perform.

agreement by means of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him; on which issue was joined. It appeared at the trial, that the plaintiff had employed one C. to let the house in question, and the defendant being in treaty with C. for taking it, asked him "if there was any objection to the house," to which he answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not:—*Held*, (Lord Abinger, C. B., dissentiente), that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea.

Plea, that the plaintiff caused and procured the defendant to enter into the said agreement, and that the defendant was induced to enter into the said agreement, through and by means of the fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him.—Verification.

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The replication traversed the plea, upon which issue was joined.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings, after last Trinity Term, the following facts appeared in evidence.—The defendant, being in search of a town residence for the purpose of educating his children, applied to Mr. F. B. Clarke, No. 116, Crawford-street, to know if he had a ready-furnished house to let in that neighbourhood. Mr. F. B. Clarke mentioned several houses, which, on looking at them, the defendant thought would not suit him. Subsequently to this, on the 29th October, 1838, Mr. F. B. Clarke wrote to inform him of the house in question, belonging to the plaintiff, stating that the rent required was 400 guineas, but that he thought 350 guineas might be taken, but certainly not less.

Upon the receipt of this letter, the defendant went with two of his sons and a friend, to look at the house in question, No. 16, York-place, Baker-street, and there saw Mr. Clarke, the father of F. B. Clarke, who had been employed by the plaintiff to let the house in question, and to whom persons making inquiries about the house had been referred. On seeing him, the defendant said that he had seen Mr. Clarke, of Crawford-street, about taking the house. Mr. Clarke replied, that that Mr. Clarke was his son, but that he himself had the letting of the house. The defendant then said, "Pray, Sir, is there anything objectionable about the house?" to which Mr. Clarke replied, "Nothing whatever;" upon which the defendant said, "Then I do not think I shall object to give 350

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guineas for the house ;” to which Mr. Clarke replied, that his son had made a mistake, that the rent was 450 guineas, and not 350. The defendant thereupon declined to give that rent, and left the house. Afterwards, however, in consequence of some further negotiation, the rent was reduced to £375, and the defendant agreed to take the house on those terms, and the agreement, for the breach of which the action was brought, was drawn up by Mr. Clarke, and signed by the defendant and afterwards by the plaintiff. On the 13th of November, the day after signing the agreement, the defendant discovered that the adjoining house to the plaintiff’s, (which was a corner house), situate in Davies-street, was a brothel of the worst description, of which there was ample evidence given at the trial, and in consequence of it persons in the immediate neighbourhood of it could not let their lodgings, and were obliged to leave their houses. It was also proved that the plaintiff was fully aware of it, and had consulted some of the neighbours as to the best mode of putting down the nuisance. The defendant, on the 14th November, through his attornies, Messrs. Egan & Waterman, gave notice of his determination not to take possession of the house, because, to his great astonishment, he had discovered that the next house to it was a house of ill fame. The defendant’s family, it appeared, consisted of two sons and two daughters, the eldest daughter being sixteen or seventeen years of age.

At the trial, the defendant began, and having proved the above facts, *Thesiger*, for the plaintiff, objected that the question put to Mr. Clarke, the agent, by the defendant, whether there was any objection *about* the house, must be considered as applying to objections *within* the house, or to the house itself, but not to objections arising from something outside and apart from the house ; which, he contended, the agent who was merely authorized to let the house, had no authority from his principal to answer. The learned

Judge overruled the objection, but left it to the jury to say whether the nuisance was such as formed a solid objection to the house; if so, and if they thought that when the defendant used the expression "*about* the house," Mr. Clarke could not have understood him in any other sense than that of an objection *to* the house, they ought to find their verdict for the defendant: and he stated his opinion to be, that although an agent could not bind his principal beyond the scope of his authority, it did not follow that the principal could enforce a contract procured by the false representation of his agent, and that the representation made by the agent must have the same effect as if made by the plaintiff himself. The jury answered both questions in favour of the defendant, and gave their verdict accordingly.

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Thesiger, in Easter Term last, obtained a rule to shew cause why there should not be a new trial on the ground of misdirection.

Kelly, Channell, and Willcock, in Michaelmas Term, shewed cause. The plea was proved, and the learned Judge was right in directing the jury to find a verdict for the defendant. The agent having been employed by the plaintiff to let the house, had necessarily authority to answer all inquiries respecting it. It will be said that the agent had only authority to answer inquiries as to matters *within* the house; but there cannot be any distinction between inquiries *about* the house, and inquiries as to matters *within* the house. The agent must have authority to answer all inquiries necessary for the purpose of letting it. The principal cannot take the benefit of the contract by acknowledging the authority of the agent to let the house, and at the same time disaffirm it by denying his authority to answer a question respecting it. When the agent was asked if there was anything objectionable about the house, he had authority

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to answer that question; and that being an act done by him within the scope of his authority, it was the same as if it had been done by the principal himself: and the principal well knew of the existence of the nuisance. The agent and the principal must be considered as one person, and identified together, where the agent is acting within the scope of his authority. [*Parke, B.*—The difficulty here is, that under this plea you are to make out fraud in the plaintiff or his agent; but it is not shewn that the agent knew of the existence of this objection to the house, and the plaintiff did not make the representation, or know of its having been made. If you could make out that the plaintiff knew that Clarke was ignorant of it, and had employed him on purpose that he might make that answer, then it might have been a fraud in the plaintiff.] It is submitted that the knowledge of the principal is the knowledge of the agent, and vice versâ; if so, it is the same as if the representations were made by the plaintiff himself. In *Fitzherbert v. Mather* (a), it was so held; and *Ashurst, J.*, says, "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted, that the principal knows whatever the agent knows." And *Buller, J.*, says, "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer." In *Doe v. Martin* (b), the doctrine that the knowledge of the agent is the knowledge of the principal, is fully recognised; and Lord *Kenyon* there says (c), "The maxim, that the principal is civilly responsible for the acts of his agent, universally prevails, both in courts of law and equity." [*Parke, B.*—That was the fraud of the agent, and it cannot be disputed that that would vitiate the transaction.] Then the converse of the proposition is also true, and the knowledge of the principal

(a) 1 T. R. 16.

(b) 4 T. R. 39.

(c) P. 66.

is the knowledge of the agent: *Mayhew v. Eames* (a). There an agent, employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank notes to a common carrier, to be forwarded to his principals in London, which parcel was lost. The carriers had given notice that they would not be accountable for parcels containing bank notes. The agent had no knowledge of such notice, but the principals had: and it was held that it was their duty to have instructed their agent not to send bank notes by that carrier, and that the latter was not responsible. So here, the plaintiff ought to have communicated this fact to the agent whom he employed to let the house, and if he did not, he is equally bound. And in *Schneider v. Heath* (b), where a ship was sold, "to be taken with all faults," it was held, that the vendor could not avail himself of that stipulation, if he knew of secret defects in her, and used means for preventing the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. *Mansfield*, C. J., says, "It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if it turns out to be false." So, in the recent case of *Willis v. The Bank of England* (c), Lord *Denman*, in delivering the judgment of the Court, says, "The general rule of law is, that notice to the principal is notice to all his agents;" and if so, the knowledge of the principal is the knowledge of the agent. In *Gladstone v. King* (d), which was an action on a policy on a ship, Lord *Ellenborough* recognises the principle of law, that what is known to the agent is impliedly known to the principal. In *Grant v. Munt* (e), a compensation for dry rot in a house was decreed upon the representation of the vendor's wife to the purchaser as to the state of the repairs; the

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(a) 3 B. & C. 601.

M. 478.

(b) 3 Camp. 508.

(d) 1 Mau. & S. 35.

(c) 4 Adol. & Ell. 21; 5 Nev. &

(e) Coop. Chan. Cases, 173.

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purchaser relying upon such representations, and stating to the vendor that he did not employ a surveyor for that reason. So in *Edwards v. M'Leay* (a), where the defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, it afterwards appeared that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or been threatened, it was held that a bill lay to set aside the conveyance, and for a return of the purchase-money and all expenses. The judgment was put on the ground that the suppressed facts, if disclosed, would at all events have influenced the price, even supposing the purchaser might have been willing to run a risk with regard to the title. Now here, if the fact of the existence of a brothel in the adjoining house had been known, it would most undoubtedly have affected the price at which it would let : and the principal was bound to inform his agent of a circumstance which would so affect it, and if he does not, then he is guilty of fraud. The plea was therefore fully established.

Thesiger and *W. H. Watson*, contra.—The learned Judge was incorrect in stating to the jury, that the agent must be presumed to have the knowledge of the principal, and that the representations of the agent must be treated as those of the principal. There is a great difference between the representations of an agent and the representations of the principal ; because the former is only authorized to act within the scope of his authority. Now here, the mere fact of Clarke having authority to let the house did not enable him to bind his principal by any representation he might choose to make about the neighbourhood of the house. All that he was authorized to do was to answer inquiries as to the nature, qualities, and conveniences of the house itself. He had no authority to make any representations as to extrinsic circumstances respecting the neighbourhood. Suppose this brothel had been four or

(a) Coop. Chan. Cases, 308.

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five doors off, or suppose the house had been a gaming-house, could it be said that the agent's making this answer would be a misrepresentation for which the principal would be liable? Surely not. By employing a house agent, he does not give him authority to make such representations as, if made by the principal himself, would be binding upon him. But, assuming that Clarke had authority, then comes the important question, whether, there being no evidence to shew that Clarke was aware of the objection to the house, though the plaintiff did know of it, and there being no evidence that the plaintiff knew at the time of signing the agreement that Clarke had made such representation, the plea of fraud and covin is not established. The principal did not know of the representation having been made before he signed the contract, and the agent was not aware of the existence of the nuisance. There is no authority for saying that, under the circumstances of this case, the knowledge of the principal is the knowledge of the agent, so as to bind the principal, and render him liable for a fraudulent representation. It has been said that the principal is bound to communicate his knowledge to the agent; but that is an argument drawn from cases of insurance, which are distinguishable. In those cases, the underwriter has no knowledge whatever, except what is communicated to him by the assured; and therefore, if a principal employs an agent to effect an insurance for him, he is bound to communicate to him all that he knows respecting the subject-matter to be insured. But was the plaintiff here bound, at all events, to communicate the fact of the existence of this brothel to his agent? A party has a right to sell an article with all faults; and, in such case, he is only guilty of fraud when he takes pains to conceal some defect. In cases of insurance, the contract is made entirely on the faith that every thing which the party knows is communicated to the underwriter; but here it cannot be said that

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this contract was entered into on the faith of this representation; the defendant might have ascertained, by inquiry in the neighbourhood, whether any such objection as this existed. In *Doe v. Martin*, there was fraud on the part of the agent: but here Clarke was an innocent party, and bonâ fide believed what he said to be true. In *Schneider v. Heath*, there was a concealment of secret defects in the ship, which the agents conducting the sale must have known at the time. Now, in this case, as there is no evidence to shew that Clarke knew of this objection, and as the contract contains nothing of this representation, the plaintiff cannot be affected by it. This is not such a deceit as would go to invalidate the contract. In *Grant v. Munt*, the defect was a latent one, which the purchaser himself could not have discovered; and there the wife knew that the house had the dry rot, and made the false representation. So, in *Edwards v. M'Leay*, there was a latent defect, and the representation was made by the seller, with a knowledge of the defect, and the decision was put upon the ground of its being in the knowledge of the seller. But whether this was a representation by the plaintiff or his agent, yet inasmuch as it was a matter which the defendant, if he had made proper inquiries, might have discovered, he is not entitled to shut his eyes to the fact, and enter into a contract, and then say that he has been deceived by a false representation. The question is, whether this is such a fraud as would entitle the defendant to maintain an action for deceit, as in *Dobell v. Stephens* (a), where the party kept the house, and brought an action for the false representation; and that is the test; for if the party could not maintain an action of deceit, the contract may be enforced against him. In *Dawes v. King* (b), it was held by Lord Ellenborough, in an action against a vendor for a deceitful representation, that the plaintiff must prove that deceit was

(a) 3 B. & C. 623.

(b) 1 Stark. N. P. C. 75.

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used by the defendant for the purpose of throwing the plaintiff off his guard, and preventing him from being watchful. But *Pickering v. Dowson* (a) is strongly in point. It was there held, that if a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for deceit lies against the vendor, on the ground that the article sold is not answerable to that description, whether the vendor knew of the defects or not. There *Gibbs, J.*, says (b),—"I hold, that if a man brings me a horse, and makes any representation whatever of his quality or soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations, and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case. In this case, if there had been any fraud, I agree it would not have been done away by the contract; but, in this case, there is no evidence of any fraud at all." Now it is quite clear from that case, that a mere misrepresentation is not equivalent to fraud. In *Kain v. Old* (c), *Abbott, C. J.*, says,—“Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract.” So, in *Geddes v. Pennington* (d), where a horse was sold under a warranty of soundness, but with a misrepresentation as to the place from which he was brought, it was held, that if the horse answered the warranty at the time of the sale, the misrepresentation as to the place from which he came

(a) 4 Taunt. 779.

(c) 2 B. & C. 627.

(b) P. 786.

(d) 5 Dow, 164.

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would not invalidate the contract. Then, is there in this case any fraud on the part of the plaintiff or his agent? It is submitted that there is none whatever. All that it amounts to is a mere omission to communicate the fact to his agent; but it was not necessary for him to communicate the fact to the agent, unless he was also bound to communicate it to the purchaser. There is no fraud in the agent in asserting that to be true which he did not know to be false, but believed to be true, for which an action could be maintained. *Haycraft v. Creasey (a)* is an authority to shew that an action for a false representation cannot be sustained if such representation be made by the defendant bonâ fide, and with a belief of the truth of it; because the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiff by means thereof. In that case, *Lawrence, J.*, says,—“I have always understood the doctrine laid down in *Pasley v. Freeman (b)* to be, that, without fraud, there was no cause of action.” In order to support such an action, there must be a statement of a falsehood known by the person making it to be one. And to support this plea, there ought to have been shewn such fraud and covin, for which an action of fraudulent representation and deceit might have been maintained.—They referred also to the judgment of Lord Denman, C. J., in *Levy v. Langridge (c)*.

Cur. adv. vult.

The Judges, differing in opinion, now delivered their judgments seriatim.

ROLFE, B.—This was an action for breach of a contract, under which the defendant agreed to become tenant to the plaintiff of a house in York-place, at a yearly rent of £375. The defendant pleaded that he had been induced to enter into the contract by the fraud and covin of the plaintiff; and on this plea issue was joined.

(a) 2 East, 91.

(b) 3 T. R. 51.

(c) 4 M. & W. 338.

It appeared on the trial, that the plaintiff, being the owner of the house in question, employed an agent of the name of Clarke to let it; and the defendant, being in treaty with Clarke for hiring it, asked him if there was any objection to the house, to which Clarke answered that there was not. On the faith of that representation the defendant entered into the contract. After he had done so, he discovered that the adjoining house was a brothel, and on that ground he declined to fulfil the contract, alleging that Clarke's statement of there being no objection to the house was a fraudulent misrepresentation, and that but for such statement he would not have entered into the contract. The jury found for the defendant, and the counsel for the plaintiff afterwards obtained this rule nisi to set aside the verdict, and for a new trial, on the ground that Clarke was not proved to have had authority to make such a statement, or to have known of the nuisance in question, though the plaintiff himself must have been aware of its existence. The point for our decision is, whether it was properly left to the jury, in the absence of proof of express authority, to treat the defendant as not being liable in this action, on the ground that the representation of Clarke was a representation by an agent made in the ordinary course of business, and therefore binding on the principal. It was not shewn at the trial what was the precise extent of the authority given to Clarke, but I will assume that he had all the authority usually confided to house agents, and in the absence of express proof he cannot be assumed to have had more. If an agent so authorized should enter into an agreement to let the house of his principal, making it part of the contract that the house was free from any particular nuisance, as, for instance, the immediate neighbourhood of a brothel, it is obvious the principal could only enforce the contract, or recover damages for the breach of it, by shewing that he was able and willing to do what his agent had contracted

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to do, that is, to let to the intended tenant the house free from the particular nuisance. No question as to the extent of the agent's authority could in such a case arise. The landlord, insisting on his agent's contract, must take it in solido, with all its qualifications and provisions. If, instead of an action at the suit of the landlord, the intended tenant should sue the intended landlord for the breach of such a contract, on the ground that the agent had agreed to let a house free from the nuisance of a brothel, then the question argued in this case, as to the authority of a house-agent to make such a contract binding on his principal, would arise. But the present is not a question as to the power of an agent to bind his principal *by contract*, but as to his power to affect him by a *representation collateral to the contract*. Now, in order to do this, it is essential, according to what was laid down by Gibbs, C. J., in *Pickering v. Dowson* (a), to bring home fraud to the principal; and that was certainly not done in this case, where all the facts are consistent with the hypothesis, that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself, or even with the stronger supposition that he expressly desired Clarke not to make any representation at all on the subject. If the plaintiff, knowing of the nuisance, expressly authorized Clarke to state that it did not exist, or to make any statement of similar import; or if he purposely employed an agent, ignorant of the truth, in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing, in either of these cases he would be guilty of a fraud, and the truth of the plea would then, I think, have been established. But on the general ground of the authority of an agent to bind his principal in matters within

(a) 4 Taunt. 786.

the scope of his authority, on which the case was left to the jury, I think that as no express authority was proved to have been given by the plaintiff, authorizing Clarke to make the representation in question, the fraud stated by the plea is not made out, and consequently the rule for a new trial ought to be made absolute.

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ALDERSON, B.—In this case the parties have entered into an agreement which is in writing, and to the terms of which nothing can be added, and from them nothing subtracted.

The agent makes a representation at the time of the negotiation, which is contrary to the fact. If that were a fraudulent representation, and in consequence of that representation the bargain was made, the defendant will not be liable, by reason of the fraud, and this is the point raised by these pleadings.

But here the representation, though false, was believed by the agent to be true. He therefore, if the case stopped here, has been guilty of no fraud.

The jury have, however, found that the true facts were known to the principal, though not communicated by him to the agent; and it is said this knowledge, on the part of the principal, is sufficient to establish the fraud.

If, indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit. But this fact also fails. It may perhaps be admitted, that such a statement, if made part of the original written contract, would be within the scope of the general agency here shewn to exist. But the contract is in writing, and this is no part of it. And I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any:—the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor ever directed the agent to make it; and the agent, be-

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cause, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*.

It is said that this will open a door to fraud, by enabling parties in the situation of this principal, themselves conscious of objections to their premises, to appoint agents, who unconsciously may make misrepresentations to the injury of third persons. This does not follow. If the fact could be shewn, it would be a fraud on the part of the principal with such a motive to appoint such an agent; and the third party is not (except from his own imprudence) in any real danger, for he may always protect himself by making the representation a part of the contract, in which case its falsehood, whether fraudulent or not, will be a good defence to him. For these reasons, I think there should be a new trial.

PARKE, B.—In this case I concur in opinion with my learned Brothers who have preceded me, that there should be a new trial.

It is an action on an agreement by the defendant, to take the plaintiff's house, ready furnished, for a term. The defendant pleads, that the agreement was void, on the ground of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him. That plea the defendant is to prove.

The alleged fraud consists in an untrue representation made by a house-agent, employed by the plaintiff, in answer to a question by the defendant. The question was, whether there was any objection to the house; the answer, that there was none; and it appeared that the next door was a brothel, and that the plaintiff knew it before, but the agent did not. My Lord Chief Baron thought the plaintiff was bound by the agent's representation, and left the question to the jury, whether that representation was intended to relate to intrinsic objections only, or ap-

plied to extrinsic objections also. The jury found that it was meant and understood to refer to both, and to the mode in which that question was left to the jury, or their finding upon it, no objection is made.

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But it is said, and I think justly said, that it is not enough to support the plea, that the representation is untrue; it must be proved to have been fraudulently made. As this representation is not embodied in the contract itself, the contract cannot be affected, unless it be a fraudulent representation, and that is the principle on which the plea is founded.

Now the *simple facts*, that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud: each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud. No case could be found in which such a principle is laid down, as was admitted in the course of the argument. It must be conceded, that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, *knowingly* commit a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord *Holt* held, that in an action of deceit, for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable: *Hern v. Nichols* (a). But, in the present case, the agent acted without any fraudulent intent; and therefore his act alone neither renders the plaintiff liable to an action nor vitiates the contract. It must also be admitted that if the plaintiff not merely knew of the nuisance, but purposely

(a) 1 Salk. 289.

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employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud, and the contract would be avoided; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud. But whether the facts in the case would warrant an inference that such a fraud was committed, it is unnecessary to inquire, as, if they would, this question should have been submitted to the jury.

My opinion, therefore, is, that the case has not been properly disposed of, and there ought to be a new trial.

Much discussion took place on the argument of the rule, as to the extent of the authority delegated to the agent—whether it was to make representations as to the intrinsic qualities of the house, or to extrinsic circumstances. The view of the case which I have taken, makes it unnecessary to enter into that question in order to dispose of this rule; and upon my Lord's report, I am unable to collect exactly what the authority of the house-agent was. It certainly was not to make any *contract*, for that was clearly to be executed by both *principals*: and whether he had authority to make any representations as to the state and condition of the property, does not appear to be clear; and I abstain from entering into that question at all, inasmuch as my opinion proceeds on this, that such representations, whether within the scope of his authority or not, do not affect a regular contract, unless they be *fraudulent* representations.

LORD ABINGER, C. B.—This was an action on a contract for letting a ready-furnished house for two years, at the rent of £375, by the plaintiff to the defendant. The

breach alleged was, that the defendant refused to occupy the house or pay the rent. The plea was, that the defendant had been induced to enter into the contract by the fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him.

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The defendant's counsel began.—It appeared in evidence that Sir Frederick Fowke, the defendant, had had some correspondence with the son of Mr. Clarke, the agent of the plaintiff, to whom inquirers after the house had been referred by the plaintiff. In this correspondence the rent was stated at 350 guineas. The defendant came to town with one of his sons, and, accompanied by a friend, went to the house in York-place, Baker-street, where they found Mr. Clarke in the dining-room. The defendant and his son were both well pleased with the house, and thinking it rather cheap at 350 guineas, Mr. Clarke was pressed by the defendant to state, whether there was any objection about the house. Mr. Clarke assured the defendant that there *was no objection whatever*. The treaty went off on the rent being stated at 450 guineas, Clarke alleging that his son had made a mistake when he wrote that it was 350. Afterwards, in consequence of some further negotiation, opened by whom did not appear, but probably by Mr. Clarke, the rent was reduced to £375, and the defendant agreed to take the house, whereupon the contract in question was drawn up by Mr. Clarke, and signed by the defendant and afterwards by the plaintiff. Shortly after, the defendant discovered by accident, that in Davies-street, next door to the house in question, which was a corner house, a brothel of the most odious description was kept. There was full evidence of the grossness of the nuisance, that persons in the neighbourhood could not let their lodgings, and had been obliged to abandon their own houses; that the plaintiff was fully apprized of it, that he had consulted with some of the neighbours as to the best way of putting it down, and proposed that he would

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himself send in some servant who might be a witness.

The defendant's family consisted of two sons grown up, and two daughters, the eldest sixteen. It was out of the question to suppose that he could live in the house, and he gave notice in writing that he declined it.

This being the case of the defendant, Mr. *Thesiger*, for the plaintiff, called no witness, but submitted that there were two points: one for the jury, whether the nuisance was of such a nature as to be a substantial objection to the house; the other for the Judge, which was, that the question put to Mr. Clarke by the defendant, whether there was any objection *about* the house, must be considered as meaning to inquire as to objections within the house, which he admitted it was the province of the agent to answer; but not as to the objections arising from some matter outside of the house, which he contended the agent could not have the authority of his principal to answer, inasmuch as it opened a vast field of inquiry, and might be pushed to any assignable distance, within which it might be supposed the house might be affected by a nuisance.

I told the jury that I saw no law in the case; that if they thought the nuisance was a solid objection to the house, which I left to them, then the only question they had to decide was, whether, when the defendant put the question in which he used the expression *about* the house, Mr. Clarke could have understood him in any other sense than that of an objection *to* the house; and if they thought that to be the meaning of the question, and that there was a solid objection to the house, they should find for the defendant; and I stated, that although an agent could not bind his principal beyond the scope of his authority, it did not follow that the principal could impose upon a third party a contract procured by the false representation of his agent, and that for the purpose of that cause the representation made by Mr. Clarke must have the same effect as if made by the plaintiff. The jury gave their verdict on

both the questions I had left to them, without hesitation, for the defendant.

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Upon a motion for a new trial, the same distinction was pressed upon the Court, between an objection *in* the house and an objection *about* the house, and as I understood, it was admitted by the counsel, that had there been a good objection within the house, the contract would have been void. But it appeared to the other members of the Court that, this question arising upon a plea of fraud and covin, I was wrong in my opinion, that the representation made by the agent had the same effect as if made by the principal. For it was said, and is now said, that there was no fraud in the agent, because it did not appear that he knew of the objection; and none in the principal, because he did not make the representation. Upon which the rule was granted.

I have bestowed some consideration on this subject since, and am sorry to find myself obliged to differ from my Brethren on a matter that appears to me, but for their opinion, too plain to admit of a doubt. In the first place, it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude. Every action for the breach of a promise, for deceit, for not complying with a warranty, or for a false representation, is founded upon a legal fraud, which is charged as such in the declaration, although there be no moral guilt in the defendant. The warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said, in the language of the law, to be fraudulent, although the party making them suppose them to be correct. This point, if it could be doubted, is fully established by the case of *Williamson v. Allison* (a). That was a declaration in tort for breach of a warranty, that twenty-four dozen bottles of claret were in a fit and proper

(a) 2 East, 446.

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state to be exported to India, whereas they were at the time—and the defendant well knew they were—in a very unfit and improper state. At the trial no evidence was given of the defendant's knowledge, and the verdict being for the plaintiff, a motion was made afterwards for a new trial, on the ground that the scienter, having been alleged, ought to have been proved. But the Court, after full discussion, and a reference to cases cited in the argument, were unanimously of opinion that the allegation of the scienter was wholly unnecessary and immaterial, and therefore need not be proved. Now if the action had been for a false representation made by the seller of a material fact, by reason of which the plaintiff was induced to buy, although the seller might have supposed the fact to be true, the same reasoning or the same rule would apply;—the difference between a warranty and a representation is nothing more than this, that where there is a written contract, the warranty forms a part of the contract, but the representation is collateral to the contract, and may be made verbally, though the contract may be in writing: but if it be of a fact without which the other party would not have entered into the contract at all, or at least on the same terms, it is equally effectual, if untrue, to avoid the contract, or to give an action for damages on the ground of fraud. This is often illustrated by actions, which have been very common of late, by the purchasers of public-houses, who have been induced to buy or to give a greater price for the goodwill of the house, by a representation of the extent of its business; and if that representation turns out to be false, even though the party making it supposed it to be true, and whether that party were the principal or the agent, it has never been doubted that the contract is void, and that the buyer may recover back his money in an action for money had and received to his use. In the case of *Hodson v. Williamson (a)*, Mr. Justice Yates lays it

(a) 1 W. Black. 463.

down as a general proposition, that "the concealment of material circumstances vitiates all contracts, upon the principles of natural law." If this be true, can it be doubted that the false representation of a material circumstance also vitiates a contract? These principles are familiar to every person conversant with the law of insurance. But a policy of insurance is a contract, and is to be governed by the same principles as govern other contracts. When it is said to be a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract, in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud. But though I consider this case as coming fully within the meaning of a legal fraud, even if the agent is presumed to be ignorant of the falsehood of his misrepresentation, I am very far from conceding that it is a case void of all moral turpitude.

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The verdict of the jury entitles me to consider the question put by the defendant exactly the same as if it had been put in this form: "Is there no brothel, or smith's forge, or farrier's shop, or other nuisance so near the house as to make it objectionable?" to which the agent replies, "I assure you there is none."

In the case of *Pawson v. Watson* (a), Lord Mansfield lays it down, generally, that in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false. This maxim is neither negated nor qualified by the

(a) Cowp. 785.

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Pasley v. Freeman. The plaintiffs in those cases sought to charge a party with damages for stating that which he believed to be true, though he did not know it to be so, in answer to inquiries made by the plaintiff respecting the credit of a third person. There the defendant had no end to gain, no interest in the event, no motive to deceive; he was not one of the *dramatis personæ* in the construction of any contract. It does not follow from the principle established in these cases, that if in any one of them the defendant had been the agent employed by the purchaser of the goods to buy them for him, and even without the authority of his principal, had made false representations of his circumstances, to induce the seller to make a contract to sell his goods on credit, the seller would have been bound to deliver them.

Mr. Clarke, the agent, at least for letting the house, has in this case induced the defendant to enter into a contract by a false representation by no means free from moral turpitude, even upon the presumption that he was wholly ignorant of the matter. That the truth was known to the plaintiff is admitted; that he had an interest to conceal it, cannot be denied; nor can it be denied that it was concealed from the defendant. Whether his concealment was consistent with good faith and free from moral turpitude, may be determined by a reference to the case put by Cicero in the third book of his *Treatise De Officiis*, which I the rather mention, because the house, the sale of which he puts hypothetically, by way of example, was liable to an objection that bears some analogy to the present:—

“Vendat ædes vir bonus propter aliqua vitia, quæ ipse nôrit, cæteri ignorent: pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculis apparere serpentes; male materiata, ruinosæ: sed hoc præter dominum nemo sciat: quæro, si hoc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit,

num id injustè an improbe fecerit?" He then gives the arguments on both sides, and concludes that the vendor ought not to have concealed these defects in the house from the buyer. "Neque enim id est celare, quidquid reticeas: sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire." Then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment, for he says—"Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? certe non aperti, non simplicis, non ingenui, non just, non boni viri; versuti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri." Now, the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, combine to constitute a sufficient degree of fraud, even morally speaking, to sustain the defendant's plea, that he was induced by fraud, covin, and false representation to sign the contract. If, instead of a brothel next door to the house, some person had died of the plague in one of the chambers the week before it was let, the case would be exactly similar to that put by Cicero of the ædes pestilentes. According to the concession of Mr. *Thesiger*, that objection arising within the house, the contract, under the circumstances of this case, would be void. But according to the argument of my learned Brethren, this intrinsic objection would have made no difference; the agent not being acquainted with the fact, and the principal being no party to the representation. But it appears to me that nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation.

Put the ordinary case of a servant employed to sell a horse, but expressly forbid to warrant him sound. Is it contended that the buyer, induced by the warranty to

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give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract? This would be to say, that though the principal is not bound by the false representation of an agent, yet he is entitled to take advantage of that false representation, for the purpose of obtaining a contract beneficial to himself, which he could not have obtained without it. I own that it never had occurred to me to doubt, upon principle or upon the authority of decided cases, that the knowledge of the principal was the knowledge of the agent, and the knowledge of the agent the knowledge of the principal. In the case of *Seaman v. Fonereau* (a), the plaintiff, living abroad, wrote a letter dated 27th of June, 1740, to order his agent to effect an insurance upon a vessel; the agent received the letter the 25th of August, and effected the policy the same day; but on the 23rd of August the agent received a letter, mentioning that on the 12th the ship in question had been lost sight of all at once; that the captain had before said she was leaky, and there was a hard gale on the 13th; the ship in fact was not then lost, but was captured by the enemy on the 19th of August. It was held, however, that the policy was void, because the agent did not communicate the intelligence he had received, of which his principal knew nothing. This principle was pushed even further in the case of *Fitzherbert v. Mather* (b), where an agent having written a letter of advice on which a policy was effected, received intelligence the next day in time to have written by the post, that the ship was lost, but omitted to write. The policy not having been effected until after the second day's post had arrived, was held to be void. These are cases to shew the effect of knowledge by the agent only, but the cases are so numerous where policies have been declared void by reason of the know-

(a) 2 Stra. 1183.

(b) 1 T. R. 12.

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ledge of the principal not communicated to the agent, that it is needless to cite them; no principle being better established, at least in the law of insurance, than that the knowledge of the principal is the knowledge of the agent. That it prevails also in other cases, may be shewn by the authority of *Mayhew v. Eames* (a); there the agent, who sent goods by a carrier, did not know that the carrier had limited his responsibility by a notice, but the principal did know it, and the Court held that the knowledge of the principal was the knowledge of the agent, in favour of the carrier. The same principle was recognised in the cases of *Willis v. The Bank of England* (b), and *Schneider v. Heath*, a cause in which I was one of the counsel. It is shortly reported in 3rd Camp. 506. That was a case of the sale of a ship under a particular, which represented the hull to be nearly as good as when launched, but the vessel and stores were to be taken with all faults as they then lay. The bottom of the vessel was worm-eaten and the keel broken, and she was quite unseaworthy. The captain, when the ship was advertised for sale, had set her afloat, so that neither the person who framed the particular, nor the buyer, could discover these defects. An action was brought for money had and received, to recover back the deposit by the purchaser. The person who prepared the particular of sale proved that he had inserted the description of the vessel without having examined her, nor was he aware that it was untrue. *Mansfield*, C. J., says—“I think the particular is evidence here by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent

(c) 3 B. & Cr. 601.

(b) 4 Adol. & Ell. 39; 5 Nev. & M. 478.

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tells us, he framed this particular without knowing anything of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false." This case appears to me exactly in point, and I cannot but persuade myself that I am supported in my opinion by the great authority of Sir *James Mansfield*. These cases were all cited in the argument. I must own, however, that the principle found in them appears to me so familiar with the daily practice of the Courts and of the world, that I should not have thought it necessary to refer to cases, but for the very grave doubt thrown upon it. Where the owner of a house or of a farm employs an agent to negotiate and settle the terms of a contract for letting the one or the other, more especially when he has referred to that agent for particulars, can it be doubted that the party treating with that agent is entitled to consider him as the proper source of all information that it may be material to him to possess with a view to making his contract? Or that for the purpose of such contract, any representation, *material* to the subject of inquiry, must be considered as if made by the principal? Put the case, that Mr. Clarke the agent had been fully apprized of this objection to the house, but that in the multiplicity of his engagements he had sent a clerk to represent him, and that the clerk, in ignorance, had made the representation in question: would the argument have been urged in that case, that there was no fraud in the clerk because he was ignorant, and none in the master because he did not make the representation? But what other relation exists between master and servant, as far as third persons are concerned, but that of principal and agent? If the clerk of a merchant or tradesman offer goods for sale to a customer, with a misrepresentation very material to their value, which representation his master knows to be false,

but the clerk supposed to be true, whereupon the customer agrees to give double the real value of the goods, is the customer bound to take and pay for the goods, because the clerk only represented a fact which he did not know to be false? or is not the contract, for the purpose of trying its validity against the purchaser, to be dealt with in the same way as if the master had made the representation? *Qui facit per alium facit per se*. And what would be the condition of men, if, in every case of a treaty made with an agent, the party was under the necessity of submitting to suffer by the misrepresentations of that agent about the subject-matter, because he had not first ascertained the extent of the agent's powers?

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In transactions that are of a very unusual character, and where power is rarely granted to an agent to bind his principal, except within very strict limits, it may be a very necessary caution in the party dealing with the agent to know first the extent of his authority; but in so ordinary a transaction as that of letting a ready-furnished house, where the principal refers to a house-agent for particulars, and leaves it to him to procure a tenant—who would think of suspending the treaty, in order to write to the landlord in the country to make inquiries, lest the agent might not have full power or information to answer them? Nevertheless the argument for the plaintiff is mainly founded upon a conjecture, that the agent might possibly have had no authority to make a representation of this kind, upon which it is contended that it must not be presumed that he had such an authority without proof, and that if he had no such authority he could not bind his principal.

I grapple with this argument, first, by denying the propriety of the conjecture upon which it is founded. I maintain that a man who employs his agent to let his house or farm, or who refers inquirers to an agent for particulars upon any subject, must be presumed, if the con-

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trary be not proved, to have given that agent full authority to communicate all information that is connected with the subject, and that it may be important to the inquirer to know. But I also deny the conclusion, as far as it applies to this case. Let us simplify the case, by assuming that the agent was expressly prohibited from giving any information, except as to the amount of rent demanded, and strictly charged to refer the inquirers to the principal for all other matters; nevertheless the agent, without knowing anything of the facts, thinks fit to answer to inquiries upon every subject upon which it may be material to the tenant to be truly informed; to make such false representations as induce the tenant, without hesitation, to agree to take the house at the rent proposed: whereas no man in his senses would have taken the house at such a rent, or perhaps at any rent, had the facts been truly represented. Now, if the tenant should afterwards bring an action of deceit for a false representation, I will not stop to inquire whether the landlord would be liable, upon his proving that he expressly prohibited his agent from answering any question; but I will say that if, in such an action, he might defend himself upon the ground of the want of authority in his agent, it by no means follows that he could insist upon enforcing the contract against the tenant who renounced it. In other words, as I have before said, it does not follow, that because he is not bound by the representation of an agent without authority, he is therefore entitled to bind another man to a contract, obtained by the false representation of that agent. It is one thing to say that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and another to say, that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority.

Upon these grounds, which I own seem to me very clear, I am of opinion, that for the purpose of this plea the repre-

sentation of the agent is that of the principal; and the falsehood of that representation to the knowledge of the principal, and the concealment of a material fact to the defendant, are sufficient to sustain the plea.

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I would just add, that, in the case of *Pickering v. Dowson*, which has been referred to, there was no fraud, and no representation. The sellers had bought the ship upon a representation which they shewed to the buyer, not as their representation, but as the one made to them, and which they had no reason to doubt; and they at the same time gave to the buyer the fullest opportunity of examining the ship, of the state of which they knew nothing.

Rule absolute for a new trial.

HARRISON V. PAYNTER.

CASE against the sheriff of Surrey for a false return of nulla bona to an alias testatum fi. fa., issued at the suit of the plaintiff against the West Cork Mining Company.

The defendant pleaded, first, not guilty; secondly, that there were no goods, chattels, or effects of the said company within his the said sheriff's bailiwick, whereof he

In the year 1837 two writs of fi. fa., one at the suit of S. for £1034, the other at the suit of C. for £530, were issued against the West Cork Mining Com-

pany, and lodged with the sheriff of Surrey, who seized goods of the company to a large amount. Proceedings in Chancery were then instituted by the company, and injunctions granted to restrain the sheriff from selling the goods, but he nevertheless sold them, and they realized £1370, which he paid into his banker's hands to the account of the sheriff. On the 6th of June, 1839, (the proceedings in Chancery being still pending), the plaintiff issued a fi. fa. against the company, directed to the defendant, the sheriff for that year, and gave him notice of the former levy. On the 8th of August the proceedings in Chancery terminated; the result of which was, that the debts of S. and E. were reduced to £545, which reduced amount was paid over to them by the sheriff, and the residue, £825, paid over to the company, and the sheriff returned nulla bona to the plaintiff's execution. The same person acted as under-sheriff in the years 1837, 1838, and 1839:—*Held*, in an action for a false return, that the present defendant was not liable, inasmuch as the former writs were wholly executed by the seizure and sale of the goods by the sheriff in 1837, and therefore ought not to be transferred to the present defendant under 3 & 4 Will. 4, c. 99, s. 7, as writs "not wholly executed;" and that he was not rendered liable by having employed the same under-sheriff.

Held, also, that the balance of the proceeds of the goods after satisfying the two former executions, constituted a debt from the sheriff who levied in 1837 to the company, and as such could not be taken in execution under 1 & 2 Vict. c. 110, s. 12.

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could have levied, &c.; thirdly, that the sheriff had not any notice as in the declaration alleged, of there being any such goods, &c., within his bailiwick, whereof he could have levied: on which pleas issues were taken.

At the trial before Lord *Abinger*, C. B., at the London Sittings after last Hilary Term, the following facts appeared in evidence. In the year 1837 two writs of *fi. fa.*, one at the suit of a person named Solarte, for £1034, and the other at the suit of Elkington for £530, were issued against the West Cork Mining Company, and lodged with Alcock, the then Sheriff of Surrey, who seized under them goods belonging to the company to the amount of between £1300 and £1400. Proceedings in Chancery were then instituted by the company against the plaintiffs in those actions, and injunctions were obtained to restrain the sheriff from selling the goods, which were served upon him in July 1837. The sheriff, however, in defiance of the injunctions, sold the goods in October 1837, and they realized £1370, which having been received by the undersheriff, was by him paid into the hands of his banker, with whom he kept an account in the name of the sheriff. On the 6th of June, 1839, (the proceedings in Chancery being still pending), the present plaintiff issued the alias *testatum fi. fa.* against the company for 249*l.* 18*s.*, directed to the defendant, who had come into office in that year, and on the 17th of June served him with notice of the two former levies, and of the money remaining in the late sheriff's hands, and requiring him to make a levy out of it, and not to pay it over to the company. On the 8th of August following, the proceedings in Chancery terminated; the result of which was, that the debt of Solarte was reduced to £530, and that of Elkington to £15, which amount was paid over to them by the sheriff, and their debts satisfied, and the residue of £825 was paid over to the West Cork Mining Company under an indemnity. The sheriff returned *nulla bona* to the plaintiff's execution.

It appeared that the same under-sheriff had acted for the different sheriffs during the years 1837, 1838, and 1839. It was objected at the trial, that the plaintiff's remedy was against the late sheriff; and Lord *Abinger*, C. B., being of that opinion, the jury, under his direction, found a verdict for the defendant on the first and second issues, and for the plaintiff on the third, as to the notice: the learned Judge giving the plaintiff leave to move to enter a verdict on the two former issues for the amount of his execution, if the Court should be of opinion that the present defendant was liable.

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Kelly now moved accordingly.—The present sheriff is liable at the suit of the plaintiff. The writs issued at the suit of Solarte and Elkington were unexecuted writs down to the time of the plaintiff's execution, and as such, ought to have been transferred to the succeeding sheriff, under the provisions of 3 & 4 Will. 4, c. 99, s. 7; and the Court will presume that that has been done which the law requires to be done. The defendant had, therefore, notice of the money having been levied under those executions, and the surplus, after satisfying them, was money available in his hands for the payment of the plaintiff's claim; and having paid it over to the company, he is liable in this action for a false return. A writ of execution is "not wholly executed," until the money levied is paid over to the plaintiff in the action. The under-sheriff held the money to satisfy the former executions; and though the writs were not actually transferred, in consequence of the defendant having employed the same under-sheriff, yet it must be considered the same as if they were actually transferred from the old sheriff to the new, and then the under-sheriff ceased to hold the money for the former sheriff, and held it for the present one. [*Parke*, B.—Suppose the writs were not wholly executed, and that the under-sheriff ought to have transferred the money to the account of

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the new sheriff, but omitted to do so, can you maintain an action against the present sheriff under these circumstances?] It is submitted, that these being writs "not wholly executed," were transferred by operation of law; and if they were so, then the under-sheriff would hold the money to satisfy those writs in the hands of the new sheriff; and by operation of law, the money would become the money of the new sheriff for that purpose. But independently of that question, and even supposing that the money is to be considered as money remaining in the hands of the late sheriff, the surplus, after satisfying the former executions, was money belonging to the West Cork Mining Company, which might have been seized by the present sheriff under 1 & 2 Vict. c 110, s. 12, which enables the sheriff to seize and take any money or bank notes belonging to the person against whose estate a *fi. fa.* shall be sued out. [*Alderson*, B.—The word "money" there means specific gold and silver coin or bank notes, not a debt. Before the late act, bank notes and cash could not be taken in execution. *Parke*, B.—Under that statute you cannot seize a debt. This was not a security for a debt, nor a security for money in the funds, but a mere debt.] If that be so, the other point is important, as it has now become a general practice for sheriffs to appoint the under-sheriff who was in office the preceding year.

Lord ABINGER, C. B.—The practice of appointing the same under-sheriff to act for succeeding sheriffs has been found so convenient that it has been established by act of Parliament (*a*), that the sheriffs of each county shall appoint deputies or agents who shall be resident or have an office in London, and it has been found so convenient for succeeding sheriffs to appoint the same agent, that I should be very sorry that that circumstance should be

(*a*) 3 & 4 Will. 4, c. 42, s. 20.

made a ground for charging the new sheriff with the liabilities of the old one. I thought at the trial, and I still think, that the money received by the former sheriff on the sale of the goods, cannot be considered as money in the hands of the new sheriff, inasmuch as there was no transfer of the accounts relating to this matter from the one to the other.

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PARKE, B.—It is perfectly clear to me that the plaintiff is not entitled to a rule in this case. The facts are these. Writs of execution are issued, directed to the late sheriff, who seizes under them more than sufficient to satisfy the claims of the execution creditors. The goods are sold, and the proceeds are subsequently applied in discharge of those claims, and the residue paid over by the under-sheriff to the defendants in those actions. Under these circumstances, the present defendant having in the meantime become sheriff, it is contended that these writs ought to have been transferred from the old sheriff to the new, by virtue of the 3 & 4 Will. 4, c. 99, s. 7, which provides, that every sheriff shall, at the expiration of his office, make out and deliver to the new sheriff an account of all prisoners in his custody, and of all writs in his hands *not wholly executed by him*, and shall turn over and transfer to the care and custody of the incoming sheriff all such prisoners, writs, &c. Now I think these writs ought not to have been so transferred, because they were wholly executed; nothing remained to be done by the sheriff who had seized the goods and sold them, but to hand over the money to the plaintiffs in those executions: and when under such circumstances the new sheriff came into office, the writs ought not to be transferred to him. The money, the proceeds of the sale, remained in the hands of the banker of the former sheriff, and never came into the hands of the present sheriff, so that there was no property liable to the present execution. If, however, the balance had been paid

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over to the present sheriff, then would come the question, whether, under process of execution directed to the present sheriff, he could seize a debt due from the former sheriff to the defendant in the action. Now although bonds, bills, and notes, and other securities for money, may be taken in execution under 1 & 2 Vict. c. 110, s. 12, it has been settled, that mere debts cannot be seized: and this being a debt due from the former sheriff to the company, it is not subject to execution. With respect to the fact of the same person having acted as under-sheriff to both sheriffs, that makes no difference in point of law, as he is then employed and acting in a separate capacity, and the only effect of that would be, that notice to him would be the same as notice to a distinct agent of the former sheriff.

ALDERSON, B.—These two writs were wholly executed by the former sheriff by the seizure and sale of the goods. Upon that sale taking place, and producing, as it appears, after the Chancellor's order, more than enough to satisfy the claims of the execution creditors, the proceeds belonged partly to the execution debtor, and partly to the execution creditors. There was therefore a debt due from Alcock, the former sheriff, to each of those parties, and the question is, whether, under such circumstances, the present sheriff can be liable: and it seems to me that he cannot.

ROLFE, B., concurred.

Rule refused.

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HIRST v. HORN and Another.

DEBT for the double value of lands wrongfully held over by the defendants, as tenants to the plaintiff.—Plea, not guilty. At the trial before *Coleridge, J.*, at the last York Assizes, it appeared that the farm in question, which was about eight miles from Huddersfield, had originally been the property of the father of the two defendants, Henry and John Horn, who had sold it to the plaintiff. Henry Horn, who was an organist at Huddersfield, took the farm from the plaintiff, and it was occupied for several years, until 1836, by the defendant John Horn, Henry paying the rent, and taking receipts whereby the rent was stated to be payable on the 1st January and 1st July. On the 1st January, 1837, the plaintiff gave a notice to quit the farm, addressed to both brothers, in which he required them to quit on the 1st day of July then next, or on such other day as their holding should expire next after the expiration of half a year from the receipt of that notice. It was objected that this was not a sufficient notice to satisfy the stat. 4 Geo. 2, c. 28, s. 1; but the objection was overruled. It was alleged on the part of the defendants, that, according to the custom of the country in that part of Yorkshire, the times of holding were from Candlemas and May-day, and evidence was given for the purpose of shewing this, but they failed to prove that it applied to this farm. The defendant's counsel proposed also to call the plaintiff's attorney, to shew that Henry Horn stated to him, on the receipt of the notice, that he had nothing to do with the occupation of the land, and therefore he could not be liable in this action; but the learned Judge rejected the evidence, holding that he was liable in law for the wilful holding over of his co-tenant, and under his Lordship's directions, a verdict was found for the plaintiff, damages £90.

A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession within the 4 Geo. 2, c. 28, s. 1, to render the tenant liable for holding over after the determination of the notice.

Where, on the receipt of a notice to quit to two joint tenants, one of whom only actually occupied the land, the other said "that he had nothing to do with the land:"—*Held*, that this statement was not admissible to shew that a holding over after the expiration of the notice, was not wilful on the part of the latter.

Quære, whether a joint tenant is necessarily liable for the wilful holding over of his co-tenant?

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Dundas now moved for a new trial, on the ground of misdirection.—The first question is, whether the notice to quit was a sufficient demand of possession to satisfy the statute. It would, no doubt, be sufficient for the purposes of an ejectment, but in order to impose upon the tenant the penalties of this statute, it ought to be absolute and determinate in its terms, and to leave no doubt as to the period at which the tenancy is to expire. In *Wilkinson v. Colley* (a), a notice to quit was held to be a sufficient demand within the statute; but there it was to quit at a day certain. At that time, too, the statute was considered a remedial one, but it is now regarded as penal: *Lloyd v. Rosbee* (b). Here no specific time is pointed out from which its penal operation is to commence.

Secondly, in order to render the defendants liable in this action, there must have been a *wilful* and *perverse* holding over, and although the holdings from Candlemas and May-day were not proved to apply, yet, if the defendants had a fair doubt as to the period when their tenancy expired, which would be increased by the uncertain terms of the notice, it could not be said to be a wilful holding over after the 1st of July: *Wright v. Smith* (c).

Thirdly, the evidence of the plaintiff's attorney, as to the statement made to him by Henry Horn, was wrongly rejected. It would have shewn that *he* had no intention of wilfully holding over. Suppose a lessee for years assigned, and the assignee held over, would the lessee be liable for double value? It has been held that an executor who has not entered, is not liable for use and occupation by reason of the entry of his co-executor: *Nation v. Tozer* (d). [Lord Abinger, C. B.—Executors are not partners.] This is a penal action, and a party is not liable merely because he is the partner of the tenant actually holding over. [Parke, B.—The custom did not apply to your tenancy, and there-

(a) 5 Burr. 2694.

(c) 5 Esp. 203.

(b) 2 Camp. 453.

(d) 1 C., M., & R. 172.

fore you had no right to entertain any fair doubt as to the termination of your holding.]

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LORD ABINGER, C. B.—I think, according to the strict rules of law, it would be wrong to grant a rule in this case. What a man says for himself can be no evidence for him : if any act had been done, it would be different. I think, therefore, the learned Judge was right in rejecting the evidence of the defendant's statement. Then there was no evidence to shew that the terms of the original tenancy were altered : the rent was paid until 1836 by Henry Horn, and there was no evidence to shew a release of his interest. As to the notice, if a man holds over under a supposition that he has a right, that is a different case ; but here we must assume that it was clear the defendants had none, and that the tenancy began on the 1st of July. This is the ordinary form of notice, which has been adopted in order to prevent the tenant from turning round and setting up a different commencement of the tenancy ; and we must suppose the tenant knew the time of its expiration as well as the landlord, and that the custom did not apply.

PARKE, B.—I am of the same opinion. It is clear this was a good notice to quit, in order to determine a tenancy from year to year ; it is a form which has long been adopted, in order to prevent the effect of any mistake in the statement of the time when the tenancy expires ; and it is equally a sufficient demand of possession ; all that can be said on that point is, that if there be a real doubt as to the period of the expiration of the tenancy, an argument may be drawn from the uncertainty of the notice, to shew that the holding over was not wilful. If there were a reasonable doubt, and the defendant *bonâ fide* acted on it, that would be a fair question to be left to the jury. But here the only mode of raising any doubt was by a reference to the cus-

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tom of the country; but that clearly did not apply, nor raise any fair claim to hold over on the ground of right. There was, therefore, no misdirection, nor was the verdict wrong. With regard to the rejection of the evidence, if there had been a notice from Henry Horn that he was ready to give up the farm, I should have thought that it was a fair question to be considered, whether one defendant might not be liable, and the other not: but this was only a statement that he had nothing to do with the land.

ALDERSON, B.—I am of the same opinion. I do not, as at present advised, entirely accede to the doctrine that one tenant is necessarily bound by the wilful holding over of his co-tenant; but here the evidence was not sufficient to raise that point.

ROLFE, B.—I entirely concur. All that the defendant Henry Horn meant to say was, not that he did not intend to hold over in future, but—"take notice I am not liable for any by-gone rent, because I have had nothing to do with the occupation of the land." That was making evidence for himself.

Rule refused.

BALL v. STANLEY.

A Judge at chambers, by consent of the parties in a cause, ordered, that on payment of the debt and costs, the costs down, and the debt in six months, all further proceedings in the cause should be stayed. The defendant paid the costs down in pursuance of the order:—*Held*, that the plaintiff could not, within the six months, obtain an order to arrest the defendant, under the 1 & 2 Vict. c. 110, s. 3.

IN this case the proceedings had been stayed by the following order of *Parke, B.*, dated the 8th of August, 1839:—
"Upon hearing the attorneys or agents on both sides, and by consent, I do order, that, upon payment of £300, the debt due from the defendant to the plaintiff for which this action is brought, together with costs, to be taxed and paid as follows,—the costs down, and the debt in six

months, all further proceedings in the cause should be stayed. The defendant paid the costs down in pursuance of the order:—*Held*, that the plaintiff could not, within the six months, obtain an order to arrest the defendant, under the 1 & 2 Vict. c. 110, s. 3.

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months, *all further proceedings in this cause be stayed.* And I do further order, that unless the said debt and costs be paid as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the amount." The costs were paid down in pursuance of this order. On the 24th of January, 1840, the same learned Judge, on an affidavit stating the deponent's belief that the defendant was about to leave the country for the purpose of avoiding the payment under the above order, made an order under the 1 & 2 Vict. c. 110, s. 8, that the plaintiff should be at liberty, within four days, to issue one or more writ or writs of *capias* into one or more different counties, as the case might require, against the defendant, indorsed to hold him to bail for the sum of £300, pursuant to the statute; the defendant being at liberty to move the Court to set aside that order. A writ of *capias* accordingly issued, upon which the plaintiff was arrested.

In Michaelmas Term, *E. V. Williams* obtained a rule nisi to rescind the order, and set aside the writ: against which

Humphrey now shewed cause.—The question is, whether under the circumstances the order for the defendant's arrest was warranted by the act of Parliament. The issuing of a *capias* under that act is not at all an ordinary *proceeding in the cause*. [*Alderson, B.*—Must not the affidavit to obtain it be entitled in the cause? The plaintiff cannot have a *capias* at all until after the cause has been commenced.] No doubt there is a cause depending; but this is not a proceeding in the cause towards judgment. It is altogether collateral—a kind of excrescence on the cause—a remedy whereby the plaintiff may be assisted if necessary. A *proceeding in the cause* must mean something ordinarily and necessarily done in the progress of the cause; but the cause would be equally perfect without this. Suppose the arrest were after verdict, when the law stays the proceed-

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ings until the following Term: that would surely be no proceeding in the cause. The words of the act favour this construction—it calls the order “a special order.”

E. V. Williams, contra.—This was a bargain to this effect:—I, the defendant, will not dispute the debt, provided I have six months to pay it in (*a*). He performs his part of the bargain. Can the plaintiff, in violation of the terms of it, arrest him within the six months? If not a direct proceeding in the cause, it is a collateral proceeding in the cause, obtained on affidavits entitled in the cause, and is the parent of divers proceedings which are clearly taken in the cause—the putting in bail, or depositing money in lieu thereof, &c. [He was then stopped by the Court.]

PARKE, B.—When this matter was first before me at chambers, I was strongly inclined to think that the term “further proceedings,” in the previous order, meant only the ordinary proceedings with a view to final judgment; and under that impression I granted the order for holding the defendant to bail. The point was ably argued by Mr. *Williams* on moving for the present rule, and I am now satisfied that my first impression was wrong, and that this is clearly a collateral proceeding in the cause, although not a necessary proceeding towards obtaining final judgment. It is in effect the same thing as if the defendant originally had, for good consideration, six months’ credit for the debt; and the effect of the order is to tie up the plaintiff’s hands, and prevent his using any remedy against the defendant, until after the expiration of the six months. I ought not, therefore, to have granted this order. The result will be, that in future, when these bargains are made, and it is intended to reserve to the plaintiff the right

(*a*) It was stated that the defendant had, since this rule was obtained, and within the six months, paid the debt.

of proceeding against the defendant in the event of his being about to leave the country, a stipulation must be introduced into the rule or order by which time is given, to entitle the plaintiff to arrest the defendant if necessary: if he gives time generally, the effect of it is to stay all proceedings in the meantime. The rule must therefore be absolute: the consequence will be, that the defendant will have the costs of putting in bail, but no action is to be brought.

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ALDERSON, B.—My first impression was adverse to Mr. *Williams*, but he convinced me that this is a proceeding in the cause: it changes the nature of the cause from one commenced by a suit of summons, to one founded on a writ of *capias*. Though not a necessary proceeding to accelerate or retard final judgment, it is yet a proceeding whereby the nature of the cause is changed. All the affidavits must be intitled in the cause.

GURNEY, B., concurred.

Rule absolute accordingly.

LEWIS v. GOMPERTZ.

ASSUMPSIT by indorsee against indorser of a bill of exchange for £250, dated 18th of September, 1839, drawn by S. Rendall upon and accepted by Charles Stretton, payable three months after date to the order of the drawer, indorsed by Rendall to the defendant, and by the defendant to the plaintiff. Plea, that the defendant had issued due notice of the non-payment of the said bill of exchange, on which issue was joined.

The following letter was held to be a good notice of dishonour of a bill of exchange;—"6, Bernard Street, Russell Square. —Mr. G.—The bill of exchange for £250, drawn by S. R. on and accepted by C. S., and bearing your indorsement,

At the trial before Gurney, B., at the Middlesex Sit-

has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies over-due and unpaid with me as above, of which I hereby give you notice."

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tings in this Term, it appeared that on Monday, the 23rd day of December, the bill having become due on Saturday, the 21st, when it was duly presented for acceptance and dishonoured, the plaintiff wrote and sent to the defendant the following letter :—

“ 6, Bernard Street, Russell Square,
December 23, 1839.

“ Mr. Gompertz,

“ Sir,—The bill of exchange for £250, drawn by S. Rendall, and accepted by Charles Stretton, and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies over-due and unpaid with me, as above, of which I hereby give you notice.

“ I am, Sir, &c.,

“ C. LEWIS.”

It was objected for the defendant, that this was not a sufficient notice of dishonour, inasmuch as it did not distinctly inform the defendant that the holder looked to him for payment. The learned Judge directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, if the Court should be of that opinion.

Kelly now moved accordingly.—There are two requisites to a valid notice of dishonour: first, it must shew, either by express words or by necessary implication, that the bill has become due and been presented for payment, and that payment has been refused by the acceptor; secondly, that the party to whom the notice is addressed is considered liable, and looked to for payment. The first of these propositions has been settled by the decision of the House of Lords in *Solarte v. Palmer* (a). In accordance with that decision, the Court of Queen's Bench held, in *Strange v.*

(a) 2 C. & Fin. 93; 1 Bing. N. C. 194; 1 Scott, 1.

Price (a), that the following notice was insufficient:—*Each of Pleas, 1840.*
 “Messrs. S. & Co. inform Mr. P. that Mr. J. B.’s acceptance for 87*l.* 5*s.* is not paid. As indorser, Mr. P. is called upon to pay the money, which will be expected immediately.” *Patteson, J.*, there observed, “There is nothing on the face of this notice to shew that the bill was due, and therefore I feel it difficult to distinguish it from *Solarie v. Palmer*.” [*Parke, B.*—This notice states that the bill is over-due.] But it does not shew when it became due, or that it was presented when due. [*Parke, B.*—It is stated to have been *dishonoured*: now “dishonour” is a technical word, and implies that the bill has been duly presented.] Suppose it were presented the day after it became due, and refused; it could not, in such case, be said that the acceptor does not dishonour the bill. [*Parke, B.*—In *Hedger v. Stevenson (b)*, the notice of dishonour was in these words:—“I am desired by Mr. H. to give you notice that a promissory note, dated August 10, 1835, made by S. T., for 99*l.* 18*s.*, payable to your order, two months after date thereof, became due yesterday, and has been returned unpaid. I have to request you will please to remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post.”—We had in that case to determine between the conflicting decisions of the Court of Common Pleas, in *Boulton v. Welsh (c)*, and of the Court of Queen’s Bench, in *Grurgeon v. Smith (d)*, and we adhered to the latter.] That case, and the others referred to, were all cited in a case of *Messenger v. Southey*, which was argued in the present Term in the Common Pleas, and in which the Court have taken time to consider the question (*e*). In that case the notice was (addressed to the drawer in London),—

(a) 2 Per. & D. 278.

(b) 2 M. & W. 799.

(c) 3 Bing. N. C. 688; 4 Scott, 425.

(d) 6 Adol. & Ell. 499; 2 N. &

P. 303.

(e) The Court have since decided that the notice was insufficient. 1 Scott’s New Reports, 180.

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"Sir, this is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately. My son will be in London on Friday morning." But further, the cases of *Tindal v. Brown* (a), *Solarte v. Palmer* (b), and *Strange v. Price*, clearly establish that the notice must also intimate to the party to whom it is addressed, that the holder looks to him for payment. This notice does not convey any such information.

PARKE, B.—I am of opinion that this notice is sufficient. I entirely adhere to what I am reported, and I believe correctly, to have said in the case of *Hedger v. Stevenson*, in which this matter was much considered by us. In that case I intimated a doubt whether, although we were bound by the decision of the House of Lords in *Solarte v. Palmer*, we were bound by all the reasoning or language of the learned Judges in giving their opinion; and therefore, that I should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, "by express terms or necessary implication, that the bill was presented and dishonoured;" that it seemed to me enough, if it appeared by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor, and not paid by him. I added however,—“supposing, that we are bound by the precise expression of *Tindal*, C. J., in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the words ‘necessary implication;’ for were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor:” and I referred to a definition given by Lord *Eldon*, in *Wilkinson v. M’Adam* (c), of the term “necessary implication;” that it means “not natural ne-

(a) 1 T. R. 167.

(b) 7 Bing. 530.

(c) 1 Ves. & B. 466.

cessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed." In that case we came to the conclusion, that the decision of the Court of Common Pleas, in *Boulton v. Welsh*, was wrong. Understanding, then, the term "necessary implication" with this latitude, and taking the rule to be, that the three facts required to be conveyed in every notice of dishonour must be conveyed to the mind of the person to whom it is addressed in a written or verbal notice, either expressly, or so connected with each other as to leave no reasonable doubt upon his mind as to their meaning,—viz. first, that the bill was presented when due; secondly, that it was dishonoured; and thirdly, that the party addressed is to be held liable for the payment of it: I think that any mercantile man, who read this document, could not fail to come to the conclusion that those three requisites had been complied with. First, the bill itself is correctly described, and though not by its precise date, yet we cannot suppose the existence of another bill, drawn and accepted by the same parties and for the same amount; and if there were but one bill, the defendant must have known at what time it would fall due. In fact, this bill fell due on the 21st of December, the day before the notice was given; so that this notice, that it had been presented and dishonoured, was given in sufficient time. Then come the words—"bearing your indorsement, has been presented for payment, and returned dishonoured." Now, as I observed in *Hedger v. Steavenson*, the word "returned" has obtained among merchants a known and peculiar meaning, implying that the bill to which it relates has been *duly* presented, and dishonoured: so that we must understand, not only that there had been a presentment in this case, but a presentment *when due*. This is confirmed by the following words, "and now lies over-due," which import that the bill was not paid when at maturity. The only point upon which I entertained any doubt was, whe-

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ther it is to be collected by necessary inference from this letter, that the writer of it means to hold the defendant liable for the amount of the bill. But when he says, "it now lies over-due and unpaid with me *as above*," i. e. at 6, Bernard Street, Russell Square, what person would draw from these words any inference, but that the plaintiff gives him the notice in order that he may come to 6, Bernard Street, to take up the bill? I think, therefore, that according to my construction of the words "necessary implication," there is here a necessary implication of all the three things necessary to constitute a good notice. And I should be sorry to put an over strict construction upon a document of this nature, otherwise no merchant or other person bound to give notice of the dishonour of a bill would ever be safe, unless an attorney were always at his side, not only to draw a form of notice, but also to adapt it to each case of the dishonour of each individual bill, which would throw the most serious impediments in the way of mercantile transactions. I am of opinion, therefore, that this notice is sufficient, and that no rule ought to be granted.

ALDERSON, B.—I am of the same opinion. I adhere to what was said by this Court in *Hedger v. Stevenson*.

GURNEY, B.—I am of the same opinion. I have no doubt whatever that this notice conveyed all the necessary information.

ROLFE, B. concurred.

Rule refused.

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THIS was an information founded on the stats. 3 & 4 Will. 4, c. 53, s. 2, and 6 & 7 Will. 4, c. 60, ss. 4 & 11. The first count of the information charged, that George Davies, being an officer of customs, did, between the 1st day of January, 1838, and the day of exhibiting this information, to wit, on the 4th day of April, 1839, to wit, at Ratcliff, in the county of Middlesex, seize and arrest to the use of her said Majesty, as forfeited, a certain vessel, to wit, a vessel called the *Diane*, with her tackle, apparel, and furniture thereto belonging, of the goods and chattels of certain persons to the said Attorney-General at present unknown: for that the said vessel, being a foreign vessel, was between the times aforesaid, to wit, on the said 4th day of April, 1839, found on the high seas, within one league of the coast of the United Kingdom, that is to say, within one league of the coast of the county of Dorset, to wit, at Ratcliff aforesaid, in the said county of Middlesex, "the said vessel so found as aforesaid then and there having on board certain spirits, the said spirits not being in casks or packages containing twenty gallons *each* at the least *respectively*, contrary to the form of the *statute* in that case made and provided, whereby and by force of the *statutes* in that case made and provided, the said vessel, together with her tackle, apparel, and furniture, became

An information alleged the seizure of a certain vessel, being a foreign vessel, for being found within a league of the coast of the United Kingdom, "the said vessel having had on board certain spirits, the said spirits not being in casks or packages containing twenty gallons *each* at the least *respectively*, contrary to the form of the *statute* in that case made and provided; whereby, and by force of the *statutes* in that case made and provided, the said vessel &c. became and was forfeited." By the 3 & 4 Will. 4, c. 53, s. 2, it is provided, that vessels found within a league of the coast of the United

Kingdom, having on board any spirits not being in a cask or package containing forty gallons at the least, shall be forfeited. The 6 & 7 Will. 4, c. 60, s. 4, enacts, "that the said restrictions shall not extend to any such spirits in casks of not less than twenty gallons." The 58th section of the 3 & 4 Will. 4, c. 52, renders certain goods subject to restrictions on importation, and amongst them specifies, "spirits, not being perfumed or medicinal spirits:"—*Held*, first, that the information was not bad by reason of the introduction of the words "*each*" and "*respectively*," although those words were not in the statute; secondly, that, as the 6 & 7 Will. 4, c. 60, s. 4, repealed sect. 2 of the 4 Will. 4, c. 53, only as related to the number of gallons, the information was not bad for alleging the offence to have been committed against the form of the *statute*; thirdly, that the information was not bad for alleging the forfeiture to have accrued by force of the *statutes*, since the words, "whereby, and by force of the *statutes*," &c., might be rejected as surplusage; fourthly, that, as the information was not framed on the 3 & 4 Will. 4, c. 52, s. 58, it was not necessary to state that the spirits seized were not "perfumed or medicinal spirits."

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and was forfeited." The information contained five other counts, which were nearly similar to this, and were open to the same objections. At the trial before *Parke, B.*, at the Middlesex Sittings after last Term, a verdict was found for the Crown.

F. V. Lee now moved in arrest of judgment.—This information is founded on the 3 & 4 Will. 4, c. 53, s. 2, which provides, that if vessels of the description therein mentioned shall be found within a certain distance of the coast of the United Kingdom, having on board, or having had on board, any spirits not being in a cask or package containing forty gallons at the least, the spirits, together with the casks containing the same, and also the vessel, shall be forfeited. Then, by the 4th section of 6 & 7 Will. 4, c. 60, after reciting that, by the last-mentioned act, all spirits, not being perfumed or medicinal spirits, or rum of or from the British possessions, are required to be imported into the United Kingdom in casks containing not less than forty gallons, it is enacted, that the said restriction shall not extend to any such spirits in casks of not less than twenty gallons. Under these circumstances, it is submitted, that as the restriction with respect to the number of gallons to be contained in each cask has been imposed by two statutes, the information is bad; as it ought to have concluded "against the form of the statutes in such case made and provided." The forfeiture is imposed by the former statute, but the prohibited quantity is diminished by the latter; and it was, therefore, necessary to aver the offence to be against the form of both statutes. There is another objection, consequent upon the former:—the information concludes, "whereby, and by force of the statutes," the vessel &c. became forfeited; whereas the forfeiture is only created by the former stat. 3 & 4 Will. 4, c. 53, to which alone the words apply. These objections are not cured by the 7 Geo. 4, c. 64, s. 20, which

enacts, that no judgment upon any indictment or information shall be reversed for insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or vice versâ; since that applies only to an indictment or information for a felony or misdemeanour, and not to an information for an offence against the revenue laws.

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There is also another objection. By the 3 & 4 Will. 4, c. 52, s. 58, provision is made in the schedule as to goods subject to certain restrictions on importation, and amongst the rest, "spirits, not being perfumed or medicinal spirits; viz. all spirits, unless in ships of seventy tons or upwards; rum of and from the British plantations, if in casks, unless in casks containing not less than twenty gallons; all other spirits, if in casks, unless in casks containing not less than forty gallons." The information ought therefore to have contained these words, "*having had on board certain spirits, the said spirits not being perfumed or medicinal spirits or rum,*" so as to have excepted them out of the information. The 4th section of the 6 & 7 Will. 4, c. 60, is as follows:—"And whereas, by the said last-mentioned act, all spirits, not being perfumed or medicinal spirits, or rum of or from the British possessions, are required to be imported into the United Kingdom in casks containing not less than forty gallons; be it enacted, that the said restriction shall not extend to any such spirits in casks of not less than twenty gallons." [*Parke, B.*—You say the information ought to have negatived their being perfumed or medicinal spirits. That is on the supposition that the information is for an offence against the 6 & 7 Will. 4, c. 60.] Again, the information is bad for not following the words of the statute, which it has not done, but interpolated words not to be found in the clause on which it is framed. In the 3 & 4 Will. 4, c. 53, s. 2, the words are, "any spirits not being in a cask or package containing forty gallons at the least." In the information the

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words are, "not being in casks or packages containing twenty gallons *each* at the least *respectively*:" so that it makes the offence to consist, not in the size of the cask, but in the quantity of spirit contained in it, which gives a totally different reading to the act. [Lord *Abinger*, C. B.—"Not being in casks containing twenty gallons each at the least respectively,"—that is with reference to the capacity of each cask respectively, and such is also the meaning of the act. There appears to me no interpolation, the effect is the same.] The question is, whether, in the collocation of the words of the act, in the information, the effect is not to transpose them, so as to convert that which in the act refers to the size of the cask, into the actual contents of the cask. [*Alderson*, B.—It appears to me simply the manner of carrying out the sense of the act of Parliament. It is merely a translation of the words of the act, and it appears to me to be a very correct one.]

PER CURIAM.—There is no weight in the last objection; but we will refer to the information and the acts of Parliament, and consider whether a rule ought to be granted on the other points.

On a subsequent day,

Lord ABINGER, C. B., said—In the case of *The Attorney-General v. Le Revert*, which was moved by Mr. Lee, we have referred to the information, and the acts of Parliament on which it was framed. The act of Parliament on which, as it was contended by the Crown, the information was founded, was the 3 & 4 Will. 4, c. 53. The first objection was, that the offence was stated to have been "against the form of the statute," and that then it was said, "whereby and by virtue of the statutes in that behalf made &c.;" that there was an inconsistency here, and that in fact the information was for an offence against two statutes. On looking

at the information, it appears to us clearly that it is founded altogether on the 3 & 4 Will. 4, c. 53. By that statute it is enacted, "that any boat or vessel which shall be found or discovered to have been within one league of the coast, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, any spirits not being in a cask or package containing forty gallons at the least, shall be forfeited." This case was one in which the package in which the spirits were imported contained less than twenty gallons; and it appeared that there was a subsequent statute of the 6 & 7 Will. 4, c. 60, which repealed the former statute as to all packages in the particular case mentioned, of between twenty and forty gallons; but it left the law precisely as it was before as to all spirits imported in casks containing less than twenty gallons; and of course, as the spirits in this case were in casks containing less than twenty gallons, they were in casks containing less than forty; therefore the information is so far right.

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The next objection was, that the information contains the words "by force of the statutes." But those words, "by force of the statutes," are mere surplusage. It is not necessary to allege that it was by force of any statute that the forfeiture accrued; the former allegation is quite sufficient. The case is distinctly brought within the statute 3 & 4 Will. 4, c. 53, and the addition of the words referred to is quite unnecessary, and they may be expunged.

Then another objection made was, that the information did not negative the words of the 4th section of the 6 & 7 Will. 4, c. 60, "all spirits not being perfumed or medicinal spirits, or rum of or from the British possessions." It is said that it ought to have been alleged that they were not "perfumed or medicinal spirits or rum of or from the British possessions." It is sufficient to say, that this is met by the answer to the first objection, that this information is not founded on the statute 6 & 7 Will. 4,

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c. 60, but on 3 & 4 Will. 4, c. 53, and therefore that the introduction of the exception is not called for. For these reasons, we think there is no ground for granting a rule.

Rule refused.

REED v. THOYTS, Esq.

Case against a sheriff. The first count was framed upon 8 Anne, c. 14, s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, and of which arrear the defendant had notice; and stated that the defendant took the goods of T., the tenant of the plaintiff, under a fi. fa. issued against T. at the suit of B. This was not traversed by the pleas, and no other execution appeared:—*Held*, that the connexion of the party, who was shewn to have seized the goods, with the defendant, suffi-

CASE against the late sheriff of Berkshire. The first count was framed upon the 8 Anne, c. 14, s. 1, and stated that on the 12th of June, 1839, and for the space of a year then last past, one John Taylor held, used, occupied, and enjoyed a certain messuage and tenements, with the appurtenances, situate in the said county of Berks, as tenant thereof to the plaintiff, at and under a certain rent or sum of money therefore then payable by the said John Taylor to the plaintiff for the same: and that, on the day and year aforesaid, a large sum of money, to wit, the sum of £10, for and on account of the rent so payable by the said John Taylor to the plaintiff for the said messuage and tenements, for one year of the said tenancy which ended at and upon that day, became and was due and payable, and continually from thence hitherto had been and still was in arrear and unpaid; and thereupon, on the 18th day of June in the year aforesaid, the defendant, then being sheriff of the said county, by virtue and under pretence of a certain writ of our Lady the Queen, called a fi. fa., before then issued against the said John Taylor, at the suit of Charles James Barnes, out of the Court of our

ciently appeared, without producing any warrant from the defendant to that party.

The second count was in trover for seizing the same goods. The plaintiff put in a bill of sale of them, which had been delivered to him by his tenant before any rent was due. The tenant had remained in possession as before. The jury found the bill of sale fraudulent:—*Held*, that although the bill of sale might still be valid against the plaintiff as a party to it, though void as to other creditors, the plaintiff was not prevented from recovering on the first count, that being distinct from the second.

said Lady the Queen before the Barons of her Exchequer at Westminster, and directed to the said sheriff of the county of Berks, *took the goods and chattels of the said John Taylor*, then being in the said messuage and tenements, with the appurtenances, so in the tenure and occupation of the said John Taylor as aforesaid, of great value, to wit, of the amount of the said arrears of rent so due and owing from the said John Taylor to the plaintiff, that is to say, the amount or sum of £40. And that, after the taking of the said goods and chattels in the said messuage and tenement as aforesaid, and before the removal of the same therefrom, and also before any sale of the said goods and chattels, or any part thereof, under pretence of the said writ, that is to say, on the day and year last aforesaid, the plaintiff gave notice to the defendant, so being such sheriff as aforesaid, of the aforesaid rent being due and in arrear to the plaintiff from the said John Taylor as aforesaid, and then requested the defendant, as such sheriff, that the plaintiff might be paid his said rent so due in arrear and unpaid as aforesaid, before the said goods and chattels or any part thereof should be removed from or out of the said messuage and tenement, with the appurtenances: yet the defendant, so then being sheriff of the said county of Berks, well knowing the premises, but disregarding the duty of his said office and the statute in such case made and provided, and contriving &c. to deceive and defraud the plaintiff, and deprive him of the said arrears of the said rent so due to him as aforesaid, and of his remedy for the recovery thereof, under colour and pretence of the said writ, on the day and year last aforesaid, wrongfully, injuriously, and deceitfully removed and carried away the said goods and chattels so taken as aforesaid from and out of the said messuage and tenement, with the appurtenances, without paying or satisfying the plaintiff the said arrears of the said rent so due and owing and in arrear to him as aforesaid, or any part thereof, contrary to the form of the

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statute in that case made and provided. And the plaintiff saith, that he hath not at any time been paid or satisfied the said arrears of the said rent, or any part thereof, but the same and every part thereof was still due, in arrear, and unpaid from the said John Taylor to the plaintiff, whereby the plaintiff had been and was deprived of the benefit of a distress for the recovery and satisfaction of the said arrears of the said rent, and was in great danger of losing the same.

There was a second count in trover, alleging the goods to be the property of the plaintiff.

Pleas, 1st, not guilty; 2ndly, to the first count, that the plaintiff did not, after the taking of the said goods, &c., in the said messuage and tenement by the defendant as in the first count mentioned, or at any time before the removal of the same, give notice thereof to the defendant; nor had the plaintiff, at any time before the removal of the said goods &c., from the said messuage &c., in the first count mentioned, any notice or knowledge whatsoever of the said rent, or any part thereof, or of any rent whatsoever, being due and in arrear from the said John Taylor to the plaintiff, in manner and form as in the first count alleged; 3rdly, to the first count, that at the time of the removal of the said goods of the said John Taylor by the defendant, the rent in that count mentioned was not due and payable, and then in arrear and unpaid by the said Taylor to the plaintiff, in manner &c., as in that count alleged; lastly, to the second count, that the plaintiff was not at the said time when &c., possessed of the goods in that count mentioned.—Issues thereon.

At the trial before *Patteson*, J., at the last Berkshire Assizes, Taylor, the plaintiff's tenant mentioned in the pleadings, being called as a witness for the plaintiff, the defendant's counsel objected that he was incompetent, on the ground that, if the plaintiff obtained a verdict, Taylor would get rid of his claim for rent; and *Thurgood* v.

Richardson (a) was referred to. The learned Judge thought that that case did not apply, and held, that as the record stated the issuing a fi. fa. by Barnes, it shewed money due to him from Taylor, who would remain liable accordingly, though the plaintiff should obtain a verdict against the sheriff. The plaintiff, however, released the witness, who proved, that on the 18th of June, 1839, one M'Graw took away his goods from the house he rented from the plaintiff, after having been told by the witness that they were not his, but the plaintiff's under a bill of sale, and that £10 was due to the plaintiff for rent. He also swore that his goods were only seized under that one execution. The defendant's counsel here again objected, that even if he was estopped by the pleadings from denying that he took Taylor's goods at the suit of Barnes, it was neither admitted nor shewn that M'Graw was the person who so took them for the defendant, and that there was nothing in the notice given by Taylor to M'Graw, or any declaration by M'Graw thereupon, to shew any connexion between him and the defendant, who had denied all wrongful seizure by the plea of not guilty. The learned Judge, however, overruled the objection, on the ground that as the execution by Barnes was admitted on the pleadings, and no other execution appeared, M'Graw must be taken to have seized for Taylor's debt to Barnes. This would make his declaration evidence against the sheriff, and connect him with the sheriff so as to render the latter liable for his act: and *Barsham v. Bullock (b)*, was referred to.

Taylor further proved, that he entered the premises on the 12th of June, 1838, and not on the 24th; and that on the 23rd of February, 1839, he owed the plaintiff £66 for beer, and gave him a bill of sale of all his effects as a security, but was suffered to remain in possession as before. The bill of sale was produced for the plaintiff: notice had been given to the defendant to produce the fi. fa., but it

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Exch. of Pleas, 1840. *was not produced, nor was any evidence given of it, or of any warrant issued upon it by the defendant to M'Graw. The goods seized were proved to be worth above £10.*

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At the close of the plaintiff's case, the defendant's counsel contended that the second count, if sustained, was destructive of the first; the first alleging that the plaintiff, through the taking of his tenant's goods by the defendant, had lost the power of distraining them for the year's rent secured to him by stat. 8 Anne, c. 14, s. 1; whereas, in order to recover on the second count, the goods must have belonged to the plaintiff under the bill of sale at the time they were seized by M'Graw; that the bill of sale bound the plaintiff as a party to it; that as the year's rent was not due at the time the bill of sale was given, the goods could not have passed under it for rent (a): the rent not being due, as they contended, until the 24th of June, 1839. The learned Judge, in summing up, told the jury that though the plaintiff had adopted two inconsistent statements of his claim, he was entitled to succeed upon either, if one was established independently of the other: that, on the 23rd of February, 1839, no rent being due to him, he received from Taylor a bill of sale of his goods as a security for his debt for beer, but that after the seizure at the suit of Barnes, he seemed to have thought the continued possession of the goods by Taylor down to that event, on the 18th of June, might affect the bill of sale; and therefore rested his claim on the first count, treating the goods as Taylor's still:—that taking the goods to be the plaintiff's, as laid in the second count, there was no evidence to shew that the defendant took those goods, for nothing connected M'Graw with the defendant; so that in that case he was entitled to the verdict on that count:—that on the first count the plaintiff was entitled to a verdict for the amount of rent due, if

(a) See *Hoskins v. Knight*, 1 M. & Selw. 245.

the jury found the goods to belong to Taylor; for the bill of sale might be void as against the execution creditor, this not being one of the many cases where continued possession by the vendor was consistent with any part of the bill of sale. He then left it to the jury to say, whether a tenancy by Taylor at a rent of £10 a year began on the 12th or the 24th of June, 1838, in order to determine whether a year's rent was due on the day M'Graw seized, viz. on the 18th of June, 1839. The jury returned a verdict for the plaintiff on the first count, damages £10; and for the defendant on the other count, finding that the bill of sale was fraudulent and void.

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Ludlow, Serjt., now moved for a new trial.—First, the evidence of what was said by Taylor to M'Graw, as to the goods not being his, and of rent being due from him to the plaintiff, was improperly admitted; for even if upon the pleadings the defendant, as sheriff, was admitted to have seized the goods of Taylor, the tenant, he was not admitted to have so seized by the hands of M'Graw, nor was any connexion between them shewn by the production of any warrant from the defendant, or by M'Graw's being proved to be his bailiff at all;—while the pleas deny any wrongful act by the defendant. [*Parke*, B.—*Barsham v. Bullock* (a) is precisely in point. That was an action of debt for a penalty against the sheriff, for taking the plaintiff, whom he had arrested, to a public drinking-house without his consent. The defendant pleaded that he did not, without the plaintiff's consent, cause him to be conveyed to the drinking-house. At the trial, it was proved that the same officer who arrested the plaintiff also took him to the drinking-house without his consent; and it was held that as the plea admitted that the defendant arrested the plaintiff, and the evidence shewed that the same officer who made the

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arrest took the plaintiff to the drinking-house, it was not necessary to produce the warrant to connect the defendant with the act complained of. In this case the connexion is shewn by the proof that M'Graw seized the goods in point of fact, coupled with the admission on the record that the defendant, as sheriff, seized the goods of Taylor, it not appearing that there was any other execution.] Then, secondly, the learned Judge misdirected the jury as to the effect of the bill of sale, which, although it might be void as against creditors, was valid against the plaintiff as a party to it (a). The issues here are inconsistent, the first depending on the goods being the goods of Taylor, and the second on their being the plaintiff's. The plaintiff, by proving the bill of sale in support of the second count, shews that the goods laid in the first as belonging to Taylor his tenant, were not the goods of that tenant, but his own; and consequently, that the seizure by the defendant did not deprive the plaintiff of that remedy by distress, which is the gist of the first count.

LORD ABINGER, C. B.—The pleadings put the defendant out of Court as to the first count, because they admit that these were the goods of Taylor.

PARKE, B.—The bill of sale was invalid as against the execution, though binding as between the parties. Now the question here is on the execution. The counts are distinct; so that the point contended for as to the bill of sale does not apply to the first count at all. To support that count, it must be shewn by the plaintiff that the defendant seized goods which were liable to satisfy rent due at the time. Now as the defendant has obtained a verdict on the second count, it must be admitted that there is an end of that

(a) See *Robinson v. M'Donnell*, 143; 3 Ves. & B. 42: *Steel v. Brown*, 2 B. & Ald. 134: *Doe v. Roberts*, 1 Taunt. 381. Id. 367; 1 Daniell's Exch. Rep.

count. Then as to the first, if the goods were Taylor's, as is admitted by the pleadings, the sheriff had no right to take them without leaving sufficient to satisfy the plaintiff's rent due to him at the time of the seizure. But even had the taking of the goods of Taylor been put in issue, the result on the first count would not have been different, for Taylor's bill of sale had no operation as against the execution of Barnes. The summing up of the learned Judge was perfectly correct.

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ALDERSON, B.—The verdict was right. The bill of sale being found to be fraudulent and void as against the execution, it follows that the goods were in fact Taylor's, as laid in the first count. Then, though the bill of sale might be valid as against the plaintiff, that point is not material, for the pleadings admit that the goods which were seized were Taylor's, while M'Graw is shewn to have seized them.

GURNEY, B., and ROLFE, B., concurred.

Rule refused (a).

(a) See *Hill v. Wright*, 2 Esp. 669; *Goldmid v. Raphael*, 3 Scott, 285.

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HUMPHREYS v. JONES.

An order *nisi* before a Judge at chambers makes itself absolute unless cause be shewn: and if no one appears, the proper course is for the opposite party to go in to the Judge and get it discharged, otherwise it becomes absolute.

ASSUMPSIT for goods sold and delivered.—The declaration was delivered on the 19th of February, with the particulars of demand indorsed thereon, which stated that the action was brought to recover the sum of 32*l.* 10*s.* for timber sold and delivered. On the 20th of February, the defendant took out a summons requiring the plaintiff's attorney or agent to attend at the Judge's chambers on the following day, at three o'clock in the afternoon, to shew cause why further and better particulars should not be delivered, and why in the meantime the proceedings in the cause should not be stayed. This summons was served on the same day upon the plaintiff's attornies, who indorsed upon it their consent to an order *nisi*, and the following order, bearing date on Saturday, the 22nd of February, was drawn up by the defendant's attorney:—

“ Upon hearing the attornies or agents on both sides, and by consent, I do order, that *unless cause be shewn* to the contrary at my chambers on Monday next, at eleven o'clock in the forenoon, the plaintiff's attorney or agent shall deliver to the defendant's attorney or agent a further and better account in writing, with dates and items, of the particulars of the plaintiff's demand, for which this action is brought, and that in the meantime all further proceedings in this cause be stayed. “ J. PARKE.”

This order was duly served on the plaintiff's attornies, on the day of the date thereof. On the following Monday (the 24th February) the plaintiff's attornies attended at the Judge's chambers, pursuant to the order, for the purpose of getting it discharged, and repeatedly called out the name of the defendant's attorney; but as no one appeared, they left the chambers without taking any further step at that time, and on the 26th they sent notice to the defend-

ant's attorney that they would attend the order on the following day, at eleven o'clock in the forenoon. In reply to that notice, the defendant's attorney sent a letter, stating that as they (the plaintiff's attornies) did not attend the Judge's chambers to shew cause on the 24th, (as to which fact the affidavits were contradictory), the order had become absolute. No answer was made to this, but on the 11th of March interlocutory judgment was signed, and notice of executing a writ of inquiry given. The plaintiff's attornies had never been served with any order absolute, nor had any such order ever been drawn up.

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Theobald having obtained a rule calling upon the plaintiff to shew cause why the interlocutory judgment, and all subsequent proceedings, should not be set aside with costs—

Barstow shewed cause.—The order for particulars was an order nisi, which ought to have been turned into an order absolute, and served forthwith: *Kenney v. Hutchinson* (a); that not having been done, the judgment is regular. [*Alderson*, B.—A rule nisi makes itself absolute.] The affidavits are at variance as to the plaintiff's attornies having attended at the Judge's chambers, but they swear that they did, and repeatedly called out the name of the defendant's attorney, who did not appear to support the order, and they therefore left the chambers, thinking the order was abandoned.

PARKE, B.—I was not aware that we made orders nisi at chambers; but it appears it has been adopted from the practice of the Court in granting rules nisi. A rule nisi makes itself absolute unless cause be shewn. The proper mode in cases of this kind, when the party obtaining the

(a) 6 M & W. 171.

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order does not attend, is for the other party to go in to the Judge and say that he is ready to shew cause, and apply to have the order discharged. The practice should be analogous to the practice in Court.

The rest of the Court concurred.

Rule absolute for setting aside the judgment without costs.

BRANSON v. MOSS.

IN this case *Fortescue* moved for leave to issue a *distringas* against the defendant, who was a lunatic. It appeared that the defendant was confined in a lunatic asylum, and that his keeper, on being applied to, had refused to allow him to be served with the writ of summons.—He relied upon *Starkie v. Skilbeck* (a).

PARKE, B.—You may take your rule for a *distringas*, to be served upon the friends of the lunatic in the first instance, and if they cannot be found, then upon his keeper.

Rule granted (b).

(a) 6 Dowl. 52.

(b) See *Humphreys v. Griffiths*, ante, p. 89.

RICHARDS v. FRANKUM.

THE plea of non detinet merely puts in issue the fact of detention. If the defence be that the plaintiff was not possessed of the goods, or that the defendant was justified in detaining them, such a defence ought to be specially pleaded.

THIS was an action of detinue for a promissory note. The defendant pleaded, first, non detinet; secondly, that the plaintiff was not possessed of the note; thirdly, that

before the commencement of the suit, the plaintiff, for a good and valuable consideration, assigned and delivered the said promissory note to one John Granger, to be by him held as and for his own note; and that the said John Granger, before the commencement of this suit, delivered the said note to the defendant, to be by him held for and on the behalf and for the use and benefit of the said John Granger; and that the defendant, as the servant and by the command of the said John Granger, detained and still detains the said promissory note, as he lawfully might for the causes aforesaid.

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The replication traversed the assignment and delivery of the note by the plaintiff to Granger, and the delivery by him to the defendant.

At the trial before *Gurney*, B., at the last assizes for the county of Oxford, the jury found a verdict for the defendant on the second and third issues; the learned Judge giving the defendant leave to move to enter a verdict on the issue on the plea of non detinet also, if the Court should be of opinion that the matters of defence so found in his favour were evidence in support of that issue.

Ludlow, Serjt., now moved accordingly.—The jury, by finding on the second and third issues for the defendant, have found that the promissory note was not the property of the plaintiff, and so established the plea of non detinet, which puts in issue the wrongful holding and detaining of the note by the defendant. It is evident from the use of the words, “which he unjustly detains,” in the original writ and declaration, that the unjust detention is the gravamen of the complaint, and that is therefore put in issue by the plea of non detinet, notwithstanding the new rules. Whatever may be the effect of the new rules as to pleading specially matter of excuse, the unjust detention is the gravamen of the charge in the

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declaration ; and as that is a material allegation in it, and is traversed by the plea, and the finding of the jury on the other issues establishes that there was no unjust detention, the verdict ought therefore to be entered for the defendant.

LORD ABINGER, C. B.—There is no ground whatever for this motion. It is true that a party who brings an action of detinue, brings it for the unjust detention of his property : but where the detention is justified, the matter must be set out on the record. The only issue on non detinet is upon the fact of the detainer. If the party has a lawful excuse for the detainer, he must plead it.

PARKE, B.—There is no ground for this application. Under the plea of non detinet, a defendant might, at common law, prove that the goods were not the property of the plaintiff ; but if he had a lawful excuse for the detention, as if the goods were pawned or pledged to him for money which was not repaid, he was bound to plead it : Co. Lit. 283. a. Lord Coke there says, “In detinue, the defendant pleadeth non detinet ; he cannot give in evidence that the goods were pawned to him for money, and that he is not paid, but he must plead it ; but he may give in evidence a gift from the plaintiff, for that proveth that he detaineth not the *plaintiff's* goods.” But it is perfectly clear, that since the new rules, the defendant cannot give in evidence, under the plea of non detinet, that the goods were not the property of the plaintiff : so that in any view of the case, the matters proved in support of the second and third pleas were not evidence under the first. If the object be to shew that the chattel is not the property of the plaintiff, that cannot be done under such a plea since the new rules. If the object be to shew that the detention was lawful, and the party had a good excuse for detaining the property, then, according to the autho-

city of Lord *Coke*, such a defence ought to be pleaded, even at common law. Under the plea of non detinet, the fact of detention is alone in issue.

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ALDERSON, B.—In an action of trover, the plea of not guilty puts in issue the mere fact of the conversion, and so under the issue of non detinet, the fact of the detention is alone in issue.

ROLFE, B., concurred.

Rule refused.

GATERS, Executor of ELIZABETH ROBINSON, Deceased,
v. MADELEY.

ASSUMPSIT on a promissory note. The first count stated, that the defendant, in the lifetime of the said Elizabeth Robinson, to wit, on the 25th March, 1833, made his promissory note in writing, and delivered the same to the said Elizabeth Robinson, and thereby promised to pay to her the said Elizabeth Robinson on demand the sum of £20, and thereupon, in consideration of the premises, promised the said Elizabeth Robinson to pay her the said note according to the tenor and effect thereof. The second count stated, that in the lifetime of the said E. R., to wit, on &c., the defendant made his certain other promissory note in writing, and delivered the same to the said E. R., and thereby promised to pay the said E. R. £20 on demand; and afterwards, and after the death of the said E. R., to wit, on the 1st day of December, 1838, the defendant, in consideration of the premises, promised the plaintiff, as such executor as aforesaid, to pay him the said note according to the tenor and effect thereof.

The interest in a promissory note given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime.

Plea, that the promissory note in the first count mentioned, and the promissory note in the second count mentioned, were one and the same; and that the said promissory

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note in those counts mentioned, was made and delivered by the defendant to the said Elizabeth Robinson as in those counts is mentioned, whilst she the said Elizabeth Robinson was covert, and the wife of one John Robinson, since deceased; and that the consideration for the making of the said note by the defendant was money advanced by the said Elizabeth Robinson, whilst she was the wife of the said John Robinson, to the defendant, and that the said Elizabeth Robinson, in her lifetime, was not executrix or administratrix, neither is the plaintiff the executor or administrator, of the said John Robinson; and the defendant further saith, that he is still liable to be sued by the personal representative of the said John Robinson, deceased, for the amount of the said promissory note.

Replication, that after the making of the said promissory note, and the delivery thereof to the said Elizabeth Robinson, and during her lifetime, to wit, on the 1st of January, 1834, the said John Robinson died, without having in his lifetime done any act to reduce the said promissory note into possession, or to prevent or defeat the right of survivorship of the said E. Robinson in the same promissory note, in the event of the said John Robinson dying in the lifetime of the said E. Robinson, leaving the said E. Robinson him surviving; and the plaintiff further saith, that the said E. Robinson afterwards, to wit, on the 1st of June, 1836, died possessed of the said promissory note, and having a good and valid title to receive from the defendant the said sum of money therein mentioned. And the said plaintiff still holds the said note as such executor of the said E. Robinson as aforesaid.

Special demurrer, and joinder in demurrer.

The following were the points marked on the demurrer-book, on which the defendant contended that he was entitled to judgment on the demurrer to the replication:—because, as the promissory note was made in favour of and for money paid by the wife during her coverture, all legal interest therein vested absolutely in her husband; and at

his death his personal representative ought to have sued upon it, and that it could and did not in any manner vest in the wife, although surviving her husband; and therefore that the plaintiff, as her personal representative, has no interest in the note, and cannot maintain any action upon it.

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The plaintiff's points were, that the note did not under these circumstances vest absolutely in the husband, but was a chose in action given to the wife, which the husband might have reduced into possession by dissenting from his wife's taking any interest therein, and suing upon it in his own name, or that he might have assented to the apparent interest of the wife, and sued in their joint names; that the note was not vested absolutely in the husband until some act was done by him to reduce it into possession; that it therefore survived to the wife, on his death without any such act having been done.

Mansel, in support of the demurrer.—The interest in the note in question did not pass to the wife by survivorship, but vested in the husband's representatives. It was a personal chattel, which vested absolutely in the husband. In *M'Neilage v. Holloway* (a), it was held that the husband might sue alone on a promissory note given to his wife before her marriage; and there Lord *Ellenborough* says, "It is laid down in Coke upon Littleton (b) and Com. Dig. (e), that all chattels personal which the wife has in possession in her own right, are vested in the husband by marriage, although he do not survive her. This is a rule of law universally recognised. The words 'chattels personal' are sufficiently large to cover a negotiable instrument of this sort." [*Parke*, B.—That doctrine must be considered as qualified by the judgment of the Court in *Richards v. Richards* (d).] Promissory notes and bills of exchange are personal chattels within the meaning of the Bankrupt Act. [*Parke*,

(a) 1 B. & Ald. 221.

(c) Baron & Feme, E. 3.

(b) P. 351. b.

(d) 2 B. & Ad. 453.

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B.—That proves too much; *debts* are also goods and chattels within the meaning of that act. If a promissory note be a chattel simple, which vests absolutely in the husband, how could it have been laid down that the husband and wife might sue upon it in their joint names, as in *Philiskirk v. Pluckwell* (a)?] In *Burrough v. Moss* (b), it was held that the husband might sue in his own name only on a note given to the wife before marriage; and that a debt due to the maker from the wife, *dum sola*, could not be set off. Here the plea states, that the consideration for making the note was money advanced by the wife during the coverture, and it must be presumed to have been the money of the husband, and therefore the action would accrue to the husband alone. In *Holloway v. Lightbourne* (c), Lord *Hardwicke* says, “Where a bond or promissory note is given to a married woman, it has been held that the interest in such bond or note immediately vests in the husband, and that he may maintain an action upon it in his own name.”

PARKE, B.—There can be no doubt that this is a bad plea. This is an action on a promissory note—an instrument on which no one can sue unless he was originally a party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature; but which has indeed been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange; yet still it is a chose in action, and nothing more. When a chose in action, such as a bond or note, is given to a feme covert, the husband may elect to let his wife have the benefit of it, or if he thinks proper he may take it himself; and if in this

(a) 2 M. & Selw. 393.

(b) 10 B. & Cr. 558.

(c) MSS. note to *Nash v. Nash*,
2 Madd. 135; 2 Eq. Cas. Abr. 1,

pl. 5; and see Williams on Executors, 607—609, where the cases on this subject are collected.

case the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and in that case the remedy on it survives to the wife, or, he may, according to the decision in *Philliskirk v. Pluckwell* (a), adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her. The only doubt in this case arose from the observation of Lord *Ellenborough* in *M'Neilage v. Holloway*, that a promissory note may be treated as a personal chattel in possession. Now in that respect, I think there was a mistake, and an incorrect expression used; but it was unnecessary for his Lordship to lay down such a doctrine, in order to decide the case then before him. In fact, the decision in the subsequent case of *Richards v. Richards* (b) has qualified that position. In that case the Court of King's Bench said that a promissory note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule, that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession. The case of *Nash v. Nash* (c) is also an authority in favour of the position, that it survives to the wife; and although that case was decided before *M'Neilage v. Holloway*, it does not appear to have been cited in the latter case. I am of opinion that the note must be considered as having survived to the wife, and her executor was therefore the proper person to sue. The fact stated in the plea makes no difference, as the right of action on the instrument depends on the form of it, and not upon the consideration for which it was given: but

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(a) 2 M. & Selw. 393.

(b) 2 B. & Adol. 447.

(c) 2 Mad. 133.

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it may be observed, that it is not stated in the plea that the money advanced was the husband's. Whether the executor of the husband, where the money advanced was his, could compel an account from the executor of the wife, who recovered on the note, by a bill in equity, is another matter, with which, in a Court of law, we have nothing to do, and which could make no difference in this case, as it would not vary the right of action on the note. Our judgment must, therefore, be for the plaintiff.

The rest of the Court concurred.

Judgment for the plaintiff.

THE COMPANY OF PROPRIETORS OF NORTHAM BRIDGE
AND ROADS v. THE LONDON AND SOUTHAMPTON RAIL-
WAY COMPANY.

By a local act, 4 & 5 Will. 4, s. lxxi, (the London and Southampton Railway Act), it is enacted, that in all cases where the Railway shall cross any turnpike road, such turnpike road shall be raised or sunk by and at the expense of the Company, so as the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road:—*Held*, that a road on which toll-gates are by law erected, and tolls taken thereat, is a turnpike-road, within the meaning of that act.

SPECIAL CASE.—By stat. 36 Geo. 3, c. 94, s. 1, (local and personal), intituled “An Act for building a Bridge over the river Itchin, at or near Northam, within the liberties of the town and county of the town of Southampton, and for making a road from the said town to the said bridge, and from thence to communicate with the road leading from West End to Botley, in the county of Southampton,” certain persons are incorporated by the name of the Company of Proprietors of Northam Bridge and Roads.

By sect. 2, the Company is empowered to make, build, and keep in repair a bridge at, near, or from Northam, within the liberties of the town and county of the town of Southampton, over and across the river Itchin to the opposite shore, in the parish of South Stoneham, in the county of Southampton, with a proper ascent or approach to the said bridge at each end thereof, and fit and proper for the

passage of travellers, cattle, and carriages, and toll-houses, &c. The said bridge to be a public bridge, and all persons, horses, cattle, and carriages to have free liberty to pass over the same, on the payment of the respective tolls allowed by the act.

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By sect. 7, neither the bridge nor any tolls to be taken under the act are rateable.

By sect. 9, the Company is empowered to make one proper and commodious road, with a footway by the side thereof, from the town of Southampton or from some part of the Southampton Road to Northam, and so to the end or foot of the said bridge; and also one other proper and commodious road from the end or foot of the said bridge, on the opposite shore, into the parishes of South Stoneham, Saint Mary Extra, and Botley, in the said county, to communicate with and open into the turnpike-road leading from West End to Botley, in the said county of Southampton, each of such roads to be of the width of forty feet; on each of which two roads they are empowered to erect toll-houses and toll-gates, and for these purposes to take lands. The said two roads to be kept in repair at the cost of the Company.

Sections 10 to 17 regulate the mode of purchase of the lands required for the said roads &c., and contain compensation clauses.

By sect. 23, the property of the bridge and roads is vested in the Company.

Section 24 empowers the Company to raise £10,000 among themselves for making the bridge and roads, and in case that sum should be insufficient, they are further empowered by sect. 28 to raise among themselves the additional sum of £8000.

Sections 25, 26, and 29 relate to the division of the capital into shares, and the transfer thereof.

Section 30 empowers the Company to borrow £8000 on mortgage, and regulates assignments of the property

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of the bridge, roads, and tolls by way of mortgage, and also the transfer of such assignments.

Section 31 gives priority to payment of interest on mortgages over interest on dividends payable to proprietors.

Sections 32 to 45 contain the clauses then usually inserted in acts creating joint stock companies, for the government of such companies and their officers, and for the making of bye-laws.

Section 46 gives a table of tolls, and vests the said tolls in the Company.

Section 53 enacts, "That the roads hereby directed to be made shall be deemed and taken to be turnpike-roads, within the intent and meaning of the 13 Geo. 3, c. 84, (a General Turnpike Act), and of the several acts made for the purpose of explaining, amending, or repealing the same or some part thereof, and that all and every clause and provision contained in the said act of the 13 Geo. 3, subject to the provisions of the said other acts, (except where the same are otherwise altered by this act), shall be in full force with regard to the roads included in this act, as fully and effectually to all intents and purposes, as if this act had been made and passed previous to the said act of the 13 Geo. 3.

By 38 Geo. 3, c. 64, s. 6, (local and personal), the width of the two roads is altered from forty to thirty feet each. Both of the said recited acts are for an unlimited period, and neither act appoints trustees or commissioners for the care and management of the said two roads, but vests the same in the Company.

The said Company of proprietors, under the said acts of the 36 & 38 Geo. 3, proceeded to erect the said bridge and to make the said roads, and the same have been opened for public use since the year 1800, and certain tolls have been taken in pursuance of the provisions of the said act of the 36 Geo. 3, c. 94, s. 46.

By 3 Geo. 4, c. 126, s. 1, the act of the 18 Geo. 3, c. 84, *Exch. of Pleas,* and also various other acts of Parliament were repealed, 1840. and other provisions for the regulations of turnpike-roads were substituted in lieu thereof. *THE NORTHAM BRIDGE AND ROADS CO.*

By sect. 4 it is enacted, "that from and after the 1st day of January, 1823, all the enactments, provisions, matters, and things, in this act contained, shall extend and be deemed, construed, and taken to extend to all acts of Parliament now in force, and to all acts which shall hereafter be passed, for making, widening, turning, amending, repairing, or maintaining any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters, and things as shall be expressly referred to and varied, altered, or repealed by any such act or acts as shall be hereafter passed." *THE LONDON AND SOUTH-AMPTON RAILWAY CO.*

By 4 Geo. 4, c. 95, intituled "An Act to explain and amend an Act passed in the third year of the reign of his present Majesty, to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England," it was by sect. 90 enacted as follows:—"And whereas doubts have arisen as to the roads to which the provisions of the said recited act (3 Geo. 4, c. 126) extend, be it therefore enacted, that nothing in the said recited act or this act contained, shall extend or be construed to extend to any road or roads not under the care and management of trustees or commissioners, or to any road or roads which shall be made, maintained, or supported under the provisions of any act or acts of Parliament passed for an unlimited period, notwithstanding tolls may be collected on such roads, or shall extend to affect, alter, or interfere with the qualifications of any commissioners or other persons having the care and management of any such last-mentioned roads, or with any tolls

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By sect. 91, certain other roads, one of which is the road from London to Holyhead, by the 92nd section the turnpike road called the Commercial Road, and by the 93rd, so much of the turnpike road from Carlisle to Glasgow as lies in the county of Cumberland, are exempted from its operation.

By the 4 & 5 Will. 4, c. lxxxviii, (local and personal), intituled "An Act for making a Railway from London to Southampton," certain persons were incorporated and empowered to make the said railway.

Sect. 71 regulates the crossing by the railway of public highways not being turnpike roads, wherever they are crossed at the level of such highways.

Sect. 72 enacts as follows:—"And be it further enacted, that in all cases where the said railway shall cross any turnpike road, such turnpike road shall be raised or sunk by and at the expense of the said company, so as that the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road, by means of a bridge of such height and width, and with such an ascent or descent, as are by this act in that behalf provided." Those provisions are made by the 74th and 75th sections of this act.

By the 1 Vict. c. lxxi, intituled "An Act to alter the line of the London and Southampton Railway, and to amend the act relating thereto," the line of the London and Southampton Railway is intended to cross one of the two roads made and constructed under the first-mentioned act of the 36 Geo. 3, c. 94, viz. the road from the town of Southampton to Northam Bridge; and the said London and Southampton Railway Company, in carrying their acts into execution, have proceeded to lay down their rails and to make their railway, so as to cross the said road upon a

level, and have refused either to raise or lower the said road, or to cause the said railway to pass over the said road, or to cause the said road to pass under the said railway.

All the said recited acts are to be considered as forming part of this case, and their recitals, enactments, and provisions may be referred to by either party accordingly.

The question for the opinion of the Court is, whether the said road made under the 36 Geo. 3, c. 94, is a turnpike road within the meaning of the 4 & 5 Will. 4, c. lxxxviii, s. 72 (a).

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D. Pollock, for the plaintiffs.—The Northam Bridge Road is a turnpike road within the meaning of the 72nd section of the London and Southampton Railway Act. In Dr. Webster's Dictionary (*b*), a turnpike road is thus defined:—"A road on which turnpikes or toll-gates are established by law, and which are made and kept in repair by the toll collected from travellers or passengers who use the road." If that definition be correct,—and it is submitted that it is,—then this is a turnpike road; for it is a road authorized by act of Parliament, by which tolls are legally taken from passengers using it. The roads to be made in pursuance of the Northam Bridge Act are also, by the 53rd section of that act, described as turnpike roads. It enacts that the roads thereby directed to be made shall be deemed and taken to be turnpike roads,

(a) The question had been before the Vice-Chancellor, on a motion for an injunction to restrain the Southampton Railway Company from crossing the Northam Bridge Road on a level, when his Honour expressed an opinion that the Northam Bridge Road was not a

turnpike road, and refused the injunction, but gave the plaintiffs liberty to take the opinion of a court of law upon the question.

(b) A Dictionary of the English Language, by Noah Webster, LL.D. New York, 1828. Reprinted by E. H. Barker, Thetford, Norfolk.

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within the meaning of the then General Turnpike Act, 13 Geo. 3, c. 84, as fully and effectually, to all intents and purposes, as if that act had been previously made; and it is not at all affected in this respect by the repeal of that act by 8 Geo. 4, c. 126. In the clauses, also, of the 36 Geo. 3, which authorize the taking of tolls, ss. 46 & 48, the word "turnpikes" is again used. If this case had arisen before the repeal of the 13 Geo. 3, c. 84, no doubt could have been entertained that this was a turnpike road. But it may be said that the 4 Geo. 4, c. 95, s. 90, (which recites that doubts had arisen as to what roads the provisions of the General Turnpike Act, 3 Geo. 4, extended to, and by which it is enacted that nothing in those acts should extend to any road not under the management of trustees or commissioners), has made an alteration in this respect, and has taken these roads out of the operation of the General Turnpike Acts. The 9 Geo. 4, c. 77, s. 19, however, after reciting the former General Turnpike Acts, appears to repeal all the exceptions in those acts, and places all local acts, such as the present, within its meaning;—"all the powers, &c., contained in this act shall extend to every local turnpike act, and shall be applied and put in execution as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of such local turnpike act, and were made part thereof." The effect of that clause is to re-enact the 53rd section of the Northam Bridge Act. The language of the 72nd section of this railway act is general, "that in all cases where the said railway shall cross *any turnpike road*," &c.; it extends to every species of road which can be called a turnpike road. The object of inserting these clauses, relating to turnpike roads, was for the public protection, and the Court will give them the largest possible construction, in order to further that object. It may be said, indeed, that this is a private speculation, and that the interest in these roads

is vested in the proprietors; but that can make no difference as affecting the question whether this is a turnpike road or not. In *Rex v. The Trustees of Great Dover Street Road* (a), it was held, that, although the trustees of that road were shareholders and owners of the soil, and the surplus of the tolls was to be applied in paying the interest and principal of the shareholders, the road was a turnpike road within the provisions of the General Turnpike Act, and that the trustees were not liable to be rated in respect of it. Roads, however, may be turnpike roads without being within the operation of the general turnpike acts, as is exemplified by the exception of the Holyhead and other roads out of the operation of the General Turnpike Acts, 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95. [*Parke, B.*—Is there any clause in the Northam Bridge Act which obliges these proprietors to keep the roads in repair?] Yes; the 9th section provides that the roads shall be made, “and at all times afterwards maintained and repaired, at the proper costs and charges of the said company of proprietors, by and out of the tolls by this act granted.”

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M. D. Hill, contrà.—The definition of a turnpike road, given in Dr. Webster's Dictionary, is too wide, for that would include a railroad. The object of the Northam Bridge Act was to empower the company to erect a bridge over the river Itchin, and the roads were only accessory to it. The shares are, by sect. 25, vested in the subscribers, who are to be entitled to receive a distribution of the profits to arise therefrom, which are not limited. The provision in the 9th section, as to the repairs, is *ex abundanti cautela*, as the Company would be obliged to keep the road in repair without such a provision, at common law. The right to take

(a) 5 Ad. & Ell. 692; 1 N. & P. 157.

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toll, and the obligation to repair, do not make a road a turnpike road. In cases of toll thorough, there is a right to take toll, and a liability to repair the road, but that does not make it a turnpike road. The case of toll thorough is an apt illustration of this case. There is no distinction between the case of toll thorough, or this case, and that of a canal or a navigable river with locks to it, which the proprietors are bound to keep in repair. The true definition of a turnpike road is given by *Lawrence, J.*, in *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal Navigation* (a). He says, "Nor is this like the case of a turnpike; for there the tolls are paid for the benefit of the public, and not for the use of any individuals; and those tolls are not the subject of taxation within the statute of 43 Elizabeth." Now here these tolls are paid for the benefit of the company, and would, on that account, be liable to the payment of rates, if it were not for the special exemption contained in the 7th section of the act. But the general exemption from a liability to rates is not confined to turnpike roads only, but wherever the property is public property, the tolls are not rateable. The principle to be collected from the authorities is, that property is exempted from rateability in those cases only where the profits are applicable to public purposes: *Rex v. Inhabitants of Liverpool* (b), *Reg. v. Mayor &c. of Liverpool* (c). A turnpike road is a road on which a toll is collected for the benefit of the road, and not where it is to go into the pockets of private individuals, or to be applied to a private purpose. This road has none of the usual incidents of a turnpike road. Its non-rateability is indeed one incident: but, as has been already observed, if it were not for the special exemption in the act, the tolls of this road would be rateable.

(a) 8 T. R. 350.

(b) 7 B. & C. 64; 9 D. & R. 780.

(c) 1 Per. & D. 334; 9 Ad. & Ell. 435.

Another incident of a turnpike road is, that the county magistrates have an *ex officio* jurisdiction as trustees and commissioners, which here they have not. Neither is this road subject to the usual exemptions from toll, in the cases mentioned in the 32nd section of the General Turnpike Act. This, in truth, is like a railway rather than a turnpike road; they are both made and maintained from private funds. None of the powers given for the government of turnpike roads apply to the present case; if this is held to be a turnpike road, it will be one not subject to the code of laws regulating turnpike roads. The 4th section of the 3 Geo. 4, c. 126, by which the provisions of that act were extended to local acts for making turnpike roads, was in effect repealed by the 90th section of 4 Geo. 4, c. 95, which provided, that the act should not extend to any road not under the management of trustees or commissioners, or to any road made or maintained under any act for an unlimited period, notwithstanding tolls may be collected. Then the 53rd section of this act does not amount to a statutory declaration that it shall be a turnpike road. It says the roads shall be "deemed and taken to be turnpike roads"—not absolutely, but "as fully and effectually as if that act had been made previous to the 13 Geo. 3." The legislature, at the time of the passing of the Northam Bridge Act, may have intended that the road, though not a turnpike road, should be regulated in the same way as a turnpike road; but when it came to the passing of the 4 Geo. 4, c. 95, it had altered its views, and then directed that these private roads shall not be under the regulations of the General Turnpike Acts; no such words as "turnpike roads" are there used, but the words are "any road or roads" not under the management of commissioners, notwithstanding tolls may be collected "on such roads." The 19th section of the 9 Geo. 4, c. 77, has been referred to, but that applies to turnpike acts generally, and not to an act of this kind, which is in its nature private. The 90th section

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Exch. of Pleas, of the 4 Geo. 4, c. 95, excludes this road from the operation
 1840. of the General Turnpike Acts, and it is therefore not a
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D. Pollock replied.

LORD ABINGER, C. B.—If we had entertained any doubt in this case, we should have been desirous of taking time to consider; but we do not. Whether this is a turnpike road is not to be determined merely by reference to the 18 Geo. 3, c. 84, or any other act of Parliament. A turnpike road is a road across which turnpike gates are erected and tolls taken, and such roads existed previous to the passing of the 18 Geo. 3, c. 84, and independently of that statute altogether. A “turnpike road” means a road having toll-gates or bars on it, which were originally called “turns,” and were first constructed about the middle of the last century. Certain individuals, with a view to the repair of particular roads, subscribed amongst themselves for that purpose, and erected gates upon the roads, taking tolls from those who passed through them. These were violently opposed at first, and petitions were presented to Parliament against them; and acts were in consequence passed for their regulation. This was the origin of turnpike roads. The distinctive mark of a turnpike road is, the right of turning back any one who refuses to pay toll. Let us see whether this act of Parliament has given that power. The 9th section says, that it shall be lawful for the Company to make roads, and also to erect toll-houses, toll-gates, bars, and other conveniences for taking the tolls thereby granted; and that, as it seems to me, constitutes them turnpike roads. Then the 46th section provides what shall be the tolls which shall be taken; and that it shall be lawful for all persons, &c., chargeable with any of the tolls thereby granted, to pass for the same toll over the said bridge, and through all and every the *turnpikes*, toll-gates, and toll-

bars to be erected by virtue of that act; which shews that the words "turnpikes," "toll-gates," and "toll-bars," are used synonymously. Here, then, we find toll-gates and a right to take toll established by act of Parliament, which consequently render this a turnpike road. The legislature also, by the 36 Geo. 3, c. 94, s. 53, declares that this shall be deemed and taken to be a turnpike road within the meaning of the 13 Geo. 3, c. 84, as fully and effectually as if it had been made and passed previous to that act: they therefore take it for granted that this would be a turnpike road if the act had been passed previously; and they provide that the provisions of the 13 Geo. 3 shall be applied as far as they are applicable. Then comes the statute 3 Geo. 4, c. 126, which repeals the 13 Geo. 3, c. 84, and enacts that the provisions of that act shall extend to all acts then in force, and which shall thereafter be passed for making or repairing any turnpike roads. That leaves this road as it stood before the passing of that act. The next statute on the subject was the 4 Geo. 4, c. 95: the 90th section of which recites that doubts had arisen to what roads the former act applied, and exempts from its operation roads like the present. But still the roads continue to be turnpike roads; for if not, why should the legislature have interfered at all, or have introduced this exception with respect to them? It appears to me, therefore, to be very clear that this is a turnpike road, that the public are entitled to the protection contemplated by the Railway Act, and that the railroad ought to be carried either over or under it.

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PARKER, B.—I am of the same opinion. The question turns on the construction to be put upon the 71st and 72nd sections of the 4 & 5 Will. 4, c. lxxxviii, which was passed for the purpose of establishing a railway from London to Southampton. The 71st section applies to a highway, and the 72nd section to a turnpike road traversed by the rail-

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way. [His Lordship here read those sections.] In these enactments the legislature had in view the benefit of the public, and therefore compelled the Railroad Company, in the case of a turnpike road, where the traffic is greatest, to afford the public more accommodation, by carrying the railroad either above or under the road. The question then is, whether this road traversed by the railway is a turnpike road? I think it is. The ordinary meaning of the words "turnpike road" is, a road on which a turnpike is lawfully erected, and the public are bound to pay tolls. If a turnpike road meant a road subject to the General Turnpike Act, I should think, with the Vice-Chancellor, that this is not a turnpike road, because it is not so governed. It was regulated by the General Turnpike Act, 13 Geo. 3, c. 84; but has been exempted by the 90th section of 4 Geo. 4, c. 95, which declares that nothing in that act "shall extend or be construed to extend to any road or roads not under the care and management of trustees or commissioners." This road therefore falls within the provisions of that section. But still it is a turnpike road, because gates are lawfully erected upon it, and tolls lawfully paid; and that being so, the question of rateability is unimportant, and decides nothing on the subject. The Railway Company were bound to provide the public with greater protection than they have done, and to carry the railroad either over or under the road in question.

ALDERSON, B.—If the different acts of Parliament are properly looked at, this question will be found to be free from doubt. The first point is—what is a turnpike road? Until a turnpike act passes, no individual has a right to levy tolls, because such an act would be an infringement of the royal prerogative. A party may accept a composition, but he cannot fix a specific toll. He may do so, indeed, by act of Parliament, and, by virtue of this authority, may stop persons and oblige them to pay tolls. In this way a turnpike road is created. Then if we look to

the 53rd section of the Northam Bridge and Road Act, we shall find it expressly enacted, that the road in question shall be taken to be a turnpike road within the meaning of the statute 13 Geo. 3, c. 84. By this 53rd section the road was rendered liable to all the provisions of the 13 Geo. 3, without the necessity of having that act expressly re-enacted in the local act; so that, at that time, it was subject to the regulations of the 13 Geo. 3, with certain alterations and amendments. The statute 13 Geo. 3, c. 84, was afterwards repealed by the 3 Geo. 4, c. 126; the effect of which was, that the road still remained a turnpike road, although not subject to the provisions of the 13 Geo. 3, c. 84. The 4th section of 3 Geo. 4, c. 126, enacted, that the provisions of that act should extend to all turnpike roads. That placed the road in question under the control of the 3 Geo. 4, c. 126. Inconveniences, however, were found to result from this enactment, since many local roads of a permanent kind were, by the 4th section, exempted from the operation of the act. The 4 Geo. 4, c. 95, was then passed, the 90th section of which declared, in effect, that certain roads, notwithstanding tolls were collected upon them, should be exempted from the operation of the General Turnpike Acts. On the whole, I feel no doubt that this is a turnpike road; and as such, being much frequented, the public are entitled to the protection contemplated by this Railway Act.

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ROLFE, B.—I am of the same opinion. The question is, whether this is a turnpike road, within the meaning of the 72nd section of the Southampton Railway Act. The legislature, having given power to the Railway Company to make this railway for their own benefit, by the 72nd section provide for the convenience of the public, where roads are intersected by it. There are two provisions in the act, one giving greater, the other less, convenience to the public. In the case of turnpike roads, where the public traffic is greatest, they have directed, that the railway

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which traverses the road shall pass either over it or underneath it. The point then is, whether the road in question, so traversed by the railway, is a turnpike road or not. A turnpike road is one across which individuals are at liberty to erect gates and take tolls; and that a road is of that description, is considered a fair test of its requiring the additional security of a railway being carried over or under it. I do not consider it a turnpike road merely because it is so designated by the 53rd section of the Northam Road Act, but because there is attached to it a right to take tolls. That act did not make the road in question a turnpike road, but merely applied to it a turnpike code: it was the putting a turnpike gate across the road which made it a turnpike road. Whether the restrictions, prohibitions, and exemptions, imposed by the several turnpike acts, are in force as regards this road, it is unnecessary to decide. It is enough to say, that the right to set up gates makes it strictly and literally a turnpike road. As such, it is a road of an important character, to which the provisions of the Railway Act ought to be applied. Our judgment will, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

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The declaration stated, that, by indenture, the defendant covenanted that he

COVENANT on an indenture, dated the 3rd of March, 1827, whereby the defendant, in consideration of £3100, bargained, sold, and assigned to the plaintiff certain divi-

would, at any time or times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him; and that the plaintiff insured the defendant's life with that Company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void:—Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America:—*Held*, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected.

dends, interest, and annual produce, from time to time due and payable, or to arise from and after the decease of one Eliza Robson, during the natural life of the defendant, if he should survive her; to have, hold, receive, and take the dividends &c. thereby assigned unto the plaintiff, his executors, &c., from and after the decease of the said Eliza Robson, for and during the natural life of the defendant, if he should survive her; and the defendant did thereby for himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, administrators, and assigns, amongst other things, that he the defendant should and would at any time or times thereafter, at the request of the plaintiff, his executors, administrators, or assigns, appear at an office or offices for the insurance of lives within London, or the bills of mortality, or before the agent or agents of any such office or offices in the county where he the defendant might happen to be resident or actually to be; and then and there truly answer such questions as should or might be asked or required touching or concerning his age and state of health, and do all other necessary acts in order to enable the plaintiff, his executors, administrators, or assigns, if he or they should think proper, to insure the life of him the defendant; and should not afterwards do, or, as far as with him should lie, permit to be done, any act, deed, or thing whatsoever, whereby any such insurance might be avoided or prejudiced; as by the said indenture, reference being thereunto had, will, amongst other things, appear. And the plaintiff says, that he the defendant, in part performance of his said covenant, did afterwards, to wit, on the 8th day of March, 1827, at the request of the plaintiffs, appear at an office for the insurance of lives within London, that is to say, the office of a certain company of persons, or office, established for the purpose, and carrying on the trade or business of and for the insurance of lives, under the name of, and called and

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known by the name of, the Rock Life Assurance Company, and did then and there answer certain questions then asked and required of him, touching and concerning his age and state of health, and did then do all other necessary acts, in order to enable the plaintiff to insure the life of him the defendant in and with the said company or office, he the plaintiff then thinking proper and intending to insure the life of him the defendant in and with the said company or office, according to the course and practice of the said company or office; the answering such questions as aforesaid, and the said other matters in that behalf aforesaid, being necessary and proper, according to the course and practice of the said company or office, to enable the plaintiff to insure the life of the defendant thereupon and therewith, and being reasonable in that behalf, of all which the defendant then had notice. And the plaintiff further says, that he the plaintiff did thereupon, and within a reasonable time then next following, to wit, on the day and year last aforesaid, according to the course and practice of the said company or office, insure the life of the defendant in and with the said company or office, by a certain policy or insurance, at and for the premium of 8*l.* 17*s.* 6*d.*, payable annually in that behalf, in order to and whereby the plaintiff then became and was entitled, if such premiums should be so paid, to be paid and satisfied out of the funds and property of the said company, according to the provisions of the company's deed of settlement, within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the defendant, the sum of £3000, and such further sum or sums as might, under the regulations of the said company, be appropriated as a bonus to that policy, subject to and under the condition or proviso, amongst others, that, in case the defendant should go beyond the limits of Europe, the same should be null and void: and the plaintiff says, that

the said condition or proviso, at the time of making the said indenture, and from thence hitherto, was and is usual and reasonable; and that although he the plaintiff has performed and observed every thing in the said indenture on his part to be performed and observed, yet the defendant has broken his covenant made with the plaintiff as aforesaid, in this, to wit, that he the defendant, after the making thereof, and after the making of the said policy or insurance as aforesaid, and after he the plaintiff had paid to the said Rock Life Assurance Company divers, to wit, twelve annual premiums as aforesaid, payable in respect of the said policy or insurance as aforesaid, and after the sum that, under the regulations of the said company, would have been appropriated as a bonus to that policy, in case of the death of the defendant, had amounted to a large sum, to wit, £2000, and had become of great value to the plaintiff, to wit, the value of £2000, and after the said policy had become and was of great value to the plaintiff, to wit, of the value of £3000, to wit, on the first day of June, 1838, he the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America, whereby and by reason of the premises, the said policy became and was null and void, &c., &c.

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Special demurrer, assigning for cause, that the declaration does not contain any specific averment that the defendant, before he went beyond the limits of Europe, as in the declaration alleged, had received or had any notice from the plaintiff, or otherwise that the defendant had by any means been made or become aware of the fact, that the plaintiff had insured the life of the defendant, as in the declaration alleged, or that such insurance was subject to or under the condition or proviso in the declaration alleged; whereas the defendant could not be liable for going beyond the limits of Europe, unless he knew at the time that the policy had been effected, and that it was sub-

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Peacock, in support of the demurrer, was stopped by the Court, who called upon

Cowling to support the declaration.—The declaration is sufficient. It was not necessary to allege any notice to the defendant; for the declaration states that the defendant did, at the request of the plaintiff, appear at the Rock Life Assurance Office, and did answer certain questions put to him; and he might, therefore, have informed himself of the fact of the insurance having been effected, and of the terms and conditions of it. The general rule is, that a party is not bound to do more than the terms of his contract oblige him to do; and here there is nothing in this covenant requiring him to give any notice. Therefore, unless the circumstances were such that the defendant had not any means of informing himself of it, no notice was necessary. This contract to insure is confined to insurance offices within the bills of mortality; and the defendant might readily have informed himself by inquiry of the fact of the insurance having been effected, and of the terms and conditions of it. In Com. Dig. tit. Condition, L. 9, many instances are given where parties are not bound to give notice, but the other parties must take notice at their peril. It is there said—"If a condition, covenant, or promise, be to do an act to a stranger, or upon performance of an act by a stranger, there needs no notice; for it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it; as if a condition be to pay when A. marries, there needs no notice when A. marries. So, if a condition, covenant, or promise, be to do upon the performance of any certain and particular act by the obligee himself, he ought to do it without notice by the obligee that the act is performed;

for he takes it upon him to do it at his peril: as if the condition be to pay so much when the obligee marries, there need not be notice of his marriage." Notice is not necessary, unless where the party expressly contracts to give notice, or where it must necessarily be implied that notice is to be given, because the obligor cannot know or ascertain, from the nature of the thing, whether the act has been done or not. In *Rex v. Holland* (a), it was held, that where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts, as he is presumed from his situation to know them. In answer to the objection of want of notice, *Wood* says, in the argument,—“Notice here merely means knowledge; and when the matter is as much in the knowledge of the defendant, or more, than of any other person, the law presumes that he had knowledge:” for which he cites 16 Viner’s Abr. tit. Notice, p. 5, pl. 10, where it is said—“None is bound by the law to give notice to another of that which that other person may otherwise inform himself of:” and Lord *Kenyon*, in giving judgment, refers to that argument, and recognises it as shewing “the true grounds upon which notice is or is not required to be averred.” So here, the defendant might have informed himself whether the insurance was effected or not, and was bound to do so at his peril; and the plaintiff not having undertaken by his contract to give the defendant notice that the assurance was effected, was not bound to do so. The defendant, by his covenant, undertakes to do nothing to vitiate an insurance effected with any person within the bills of mortality, without any stipulation whatever as to notice of the particular person with whom it should be effected. [*Parke*, B.—If the covenant had spoken of an insurance

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to be effected with A. B., there would be no necessity for notice; but if it were with any person that the plaintiff may choose, then it must surely be necessary that notice should be given. Is not notice equally necessary, when the covenant applies to an insurance in any one of the many public offices within the bills of mortality? If five or six offices had been named, no notice would be necessary. If there are such a number of insurance offices in London as would render it unreasonable to expect the defendant to inquire of them all whether such an insurance had been effected, the defendant should have shewn that by his plea; not having done so, the Court will not assume it to be the fact. In *Doe v. Whitehead* (a), which was an ejectment by landlord against tenant, on an alleged forfeiture by breach of a covenant to insure "in some office in or near London," it was held that the omission to insure must be proved by the plaintiff. There the same objection would have applied, as it would have been necessary for the landlord to make inquiry at every office in or near London. Lord *Denman*, C. J., says, "The proof may be difficult, where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law; and the landlord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the Court cannot assist him." Here the district is limited; but if the number of offices within it are so inconvenient as to render inquiry difficult, the Court cannot calculate the balance of inconvenience. Suppose all the insurance offices were in one street, no notice would surely in such case be necessary. [*Parke*, B.—Have you any authority for that, or in any case where there is any choice as to where the

(a) 8 Ad. & Ell. 571; 3 Nev. & Per. 557.

insurance shall be effected?] The cases cited in Com. Dig., before referred to, are applicable in principle; but there is no case where the party's having a choice as to the office in which an insurance is to be effected, has been held to render notice necessary. In Viner's Abr., Condition (A. d.), pl. 15, it is said—"If A. sells to B. certain weys of barley, or other things, and B. assumes to pay for every wey as much as he sells a wey for to any other man; if he after sells to others certain weys for a certain sum, he shall not have an action on the case against B. upon his promise, till he hath given him notice for how much he sold the wey to others; for B. is not bound to pay it till notice, because it is uncertain and not known to him; and here he assumes in general, and not in particular, scilicet, to pay so much as J. S. shall pay for a wey, and so he does not assume to take notice at his peril;" "but," it is added in pl. 16, "if he had assumed to pay as much for every wey as he sold a wey for to J. S., if J. S. after bought a wey for a certain sum, he ought to take notice thereof at his peril, without any notice given, otherwise he hath broke his promise." If, in the present case, the number of offices had been limited, it is quite clear that notice would not have been necessary, because the Court cannot measure the inconvenience arising from a greater or less number; and the same argument will apply where the district is limited. The defendant might have remedied the inconvenience, if any inconvenience exists, by providing for it in his contract.

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Peacock, in support of the demurrer.—The principle established by the cases is, that where the act is to be done by a stranger, no notice is necessary, because the fact is as much within the knowledge of the one party as the other: but where the act is to be done by the plaintiff himself, it is otherwise, and notice must be given: *Powle v.*

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Hagger (a). There the Court expressly drew the distinction between the case where the act is to be done by a stranger, and where it is to be done by the plaintiff himself. [*Parke, B.*—In *Bradley v. Toder (b)*, and in *Fletcher v. Pynsett (c)*, where the promise was in consideration that the plaintiff would marry such a woman, the defendant would give him £100, it was held that notice of the marriage was not necessary.] In *Bradley v. Toder*, the Court at first held that the declaration was not good, because it was not alleged that the plaintiff gave notice of the marriage; and though the Court afterwards resolved that it was good, the reason given is, that it was a necessary intendment, that when, after the marriage, he requested payment of the money, notice of the marriage was given. But this is an act which lies entirely within the knowledge of the plaintiff, who effected the policy, and who alone could know the conditions annexed to it. All the cases turn upon the question, whether the defendant had the means of knowledge or not; and if he had not, or not equally with the plaintiff, then notice is requisite. [*Lord Abinger, C. B.*—Suppose the defendant had promised to pay £1000 to any banker in London that the plaintiff chose to open an account with—must not the plaintiff give him notice of the bank in which he has opened an account? *Parke, B.*—Suppose the covenant had been, that the defendant would perform the terms and conditions of any policy that the plaintiff had entered into with the Rock Life Assurance Company, he must in that case have made inquiry as to the terms upon which the policy was effected.] In ——— *v. Henning (d)*, it is said—“ If the agreement be, that he shall pay so much as J. S. in particular paid, in that case *quia constat de personâ*, and he is indifferently

(a) Cro. Jac. 492.
(c) Id. 102.

(b) Id. 228.
(d) Id. 432.

named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice; but when the person is altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice."

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In this case the plaintiff had the option of selecting any one of the insurance offices, and he was not confined with respect to the time of effecting the insurance; and he ought, therefore, to have given notice. [*Parke, B.*—Suppose it had been a promise to pay the plaintiff £100 if he should go to Rome or Naples?] There it would be his duty to give notice. When the event depends upon the performance of one of two acts which are in the plaintiff's option, he is bound to give notice, because it could only be known to the plaintiff when he had exercised his option. [*Parke, B.*—In *Haverley v. Loughton* (a), the plaintiff promised J. S., that if he borrowed of one Powell £100, he would repay that sum to him upon the same day and upon the same conditions that they between them should agree upon; and it was there held that notice was not necessary.] That case shews that where the person or the act is certain, no notice is necessary; but when the person or the act is uncertain, and the option is to be exercised by the plaintiff, then it is necessary.

Lord ABINGER, C. B.—I am of opinion that the defendant in this case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having

(a) 1 Bulstr. 12.

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been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality, to ascertain whether such a policy had been effected, he would still be obliged to do something more; namely, to learn what were the particular conditions on which it was effected; because the covenant here is, not that the defendant shall not do anything to evade the covenants or conditions usually prescribed by insurance offices; but that he shall not violate any of the conditions, by which such insurance might be avoided or prejudiced; i. e. he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions totally distinct from the conditions in general use, might be annexed by a particular insurance office; and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and without notice of them, to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless

he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled.

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PARKE, B.—My mind is not entirely free from doubt; but I am inclined, on the whole, to agree with the Lord Chief Baron. The defendant here is sued on a covenant, by which he stipulates to do two things; namely, to appear at an office for the insurance of lives, within London or the bills of mortality, in order to enable the plaintiff to effect an insurance on his life; and, after it is effected, to perform the conditions which may be contained in it. And it does not appear that this is confined to an insurance to be effected at the particular office at which he should appear, the words “such insurance” in this covenant meaning simply an insurance on his life. The defendant is bound in the first instance to appear at an insurance office; and when the insurance is effected, he is then bound, as far as in him lies, to fulfil the stipulations which have been entered into by the policy. The question then is, whether an action can be maintained on this covenant, when notice of the effecting such insurance, or of its terms, is not averred in the declaration. The general rule is, that a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite; as in the case

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of *Haule v. Hemyngham* (a), where a man promised to pay for certain weys of barley as much as he sold them for to any other man: there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and in such cases, the right of the defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone, (for there are some cases to that effect), or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases, there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at *some office* in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the

(a) *Viner's Abr. "Condition,"* (A. d.), pl. 15; *Cro. Jac.* 422.

defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case; for not only do the terms of the covenant apply to all actually existing companies of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice; and I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, &c., as the words "such insurance" seem, and perhaps with truth, to indicate, even then the option of the plaintiff is of such an indefinite nature, that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given; there is, it is true, notice of an intention to effect a policy, but none either of its having been made at all, or made with any particular conditions. Possibly, if it had been notified generally to the defendant that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature and the conditions with which it was coupled; but I think that he was, at least, entitled to notice of the fact of its existence.

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ALDERSON, B.—I am of the same opinion; and my judgment is founded on the authority of *Haule v. Hemyng*, as reported in Viner's Abr. "Condition," (A. d.), pl. 15. In this case, the defendant covenants that he will not do any act, deed, or thing, whereby any such insurance may be avoided or prejudiced. The insurance is to be effected at any time or times, or at any office or offices, within certain limits, and is not confined to the then existing offices. The plaintiff has the selection from an indefinite number; and it seems to me, that the person who is to select the office must give notice of his having done so. If the defendant had received notice that an insurance was effected in the Rock Life Insurance Company, I by no means say that he would not be bound to inform himself of any conditions to which it might be subject.

ROLFE, B.—I am of the same opinion. I own that when the case was first opened, my impression was in favour of the plaintiff; and for this reason, that when a party enters into a contract, he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable: but that is not so where a party contracts to do a particular act; for then it is his own fault for entering into such a contract. In the progress of the argument, my opinion changed; and I think that the plaintiff was bound to give notice. I find it stated in Viner's Abr. "Condition," (A. d.), pl. 10,—“If I am bound to enfeoff such persons as the obligee shall name, he ought to give notice of those he names, otherwise I am not bound to enfeoff them:” and reason seems in favour of this principle of law. The question is, what is the meaning of the contract, where a party covenants to do something at the option of another? It must mean, provided he have notice of that option having been exercised.

Judgment for the defendant.

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VANDERSTEGEN and Another v. WITHAM.

W. H. WATSON applied for a rule to shew cause why the proceedings in this action should not be stayed, in order to enable the defendant to apply for an injunction to restrain the plaintiffs from proceeding in the action. It appeared from the affidavits, that the defendant was the attorney of a Mrs. Vaughan, and had been authorized by her to receive certain rents and money for her; but that the plaintiffs, who were her trustees, had countermanded his authority, and brought this action to recover the money which he had so received. A bill in equity had been filed by the defendant against the plaintiffs, to obtain the injunction; and the affidavits stated, that he was advised and believed he had sufficient grounds for obtaining it, but that, by the practice of the Court, it could not be obtained until the lapse of about sixteen days.—*Watson* referred to, and relied upon, a note at the conclusion of the case of *Best v. Thorowgood* (a), which is as follows:—"A stay of the postea was afterwards obtained, until answer put in by the plaintiff to a bill in equity filed against him by the defendant."

Where the trustees of a lady, who had authorized the defendant to receive her rents, countermanded his authority, and brought an action to recover the money received by the defendant under that authority:—*Held*, that the Court had no power to order the proceedings in the action to be stayed, in order to give time to the defendant to obtain an injunction to restrain the action.

PARKE, B.—It is impossible for us to interfere, and to stop the plaintiffs from proceeding in their action, which, upon the facts stated, they are entitled to bring. If the defendant has any equity, he must apply to the proper Court to restrain the plaintiffs from proceeding with the suit. As to the authority cited from the case of *Best v. Thorowgood*, the note is very short, and it does not appear upon what ground the rule was granted in that case; nor am I satisfied that the decision of the Court there was correct, or consider it to be a sufficient authority for us to interfere

(a) 4 Tyrw. 264; S. C. nom. *Best v. Argles*, 2 C. & M. 394. See 3 Dowl. P. C. 701.

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and stop the plaintiffs' proceedings, when we do not know what answer they may give to the bill which has been filed against them, and it may turn out that the defendant has no equity at all.

ALDERSON, B.—It seems to me that we ought not to grant this application. It is, in effect, calling upon this Court to grant an injunction now, on the chance that some other Court will grant one at some future period. If we have power to stay the proceedings for sixteen days, there is no reason why we should not stay them for a longer period, and grant a perpetual injunction. If it be thought expedient that the Courts of law should have the power of granting injunctions, the legislature may, if they think proper, confer such a power, but at present they have none.

GURNEY, B., and ROLFE, concurred.

Rule refused.

GRANGER v. COLLINS.

Assumpsit.—The declaration stated, that whereas before and at the time of making the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, the defendant held the house and premises thereafter men-

ASSUMPSIT.—The declaration stated, that whereas theretofore, and before and at the time of the making of the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, for the residue of a certain term of years therein; and thereupon afterwards, to wit, on the 20th day of December, 1837, the defendant agreed to let to the plaintiff, who then

residue of a term of years, and thereupon afterwards, to wit, on &c., agreed to let to the plaintiff, who then agreed to take of the defendant, the said house and premises at a certain rent; and *in consideration of the premises*, the defendant promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, without any eviction from the parties entitled to the reversion; nevertheless, he the plaintiff was evicted by the party entitled to the reversion:—*Held*, on demurrer, that the declaration was bad, inasmuch as, the plaintiff having declared on the simple relation of landlord and tenant, no such duty as that laid as the defendant's promise arose from that relation.

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agreed to take of the defendant, the said house and premises, situate and being in Hunter-street, Brunswick-square, in the county of Middlesex, including the use of the several fixtures therein, for the term of three years from the 14th day of August, 1837, at the rent of 73*l.* 10*s.* a-year, payable quarterly, [setting forth the days of payment, &c. ;] and *in consideration of the premises*, the defendant afterwards, to wit, on the day and year first aforesaid, promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, and according to the true intent and meaning of the said agreement, and without any eviction from or by the party or parties entitled to the reversion of or in the said house and premises, expectant on the reversion of the defendant's lease. And the plaintiff in fact saith, that afterwards, to wit, on the day and year first aforesaid, he entered into and upon the said house and premises, and became and was possessed thereof as such tenant as aforesaid, and that he duly performed all things in the said agreement contained on his part and behalf to be performed; nevertheless the plaintiff in fact saith, that afterwards, and during the said term of three years in the said agreement mentioned, to wit, on the 5th day of July, 1839, he the said plaintiff was evicted from the said house and premises by the party or parties entitled to the reversion of and in the said house and premises expectant on the termination of the defendant's lease, contrary to the promise of the said defendant, &c.

The defendant pleaded a plea, to which the plaintiff demurred specially; but as the Court, on a former day, had intimated a doubt whether the declaration could be maintained, and the argument now turned on that question alone, the plea is omitted.

The defendant's points of objection to the declaration, appended to the demurrer book, were as follows:—That the declaration states such a promise by the defendant as

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the law will not imply, and imposes a much more extensive liability upon the defendant than he is subject to in point of law.

That the defendant's promise, as stated in the declaration, would render him liable even for a wrongful eviction of the plaintiff by the party or parties entitled to the reversion expectant on the termination of the defendant's lease, or for an eviction (as in the present case) in consequence of the plaintiff's own wrongful act, his breach of the agreement under which he held the premises as the defendant's tenant.

That the promise stated in the declaration is not warranted by the introductory statement therein, nor is such a promise as would be inferred or implied by law from the facts stated in the declaration.

Kelly, in support of the declaration. It may be admitted that the declaration would be bad, if the promise were laid as resulting from the simple relation of landlord and tenant; but it is submitted that it is not so stated. It may be that the consideration for the promise is ambiguously stated, and might be insufficient upon special demurrer. There is nothing here to shew that the defendant did not enter into a written agreement, to the effect of the promise set forth in the declaration. [*Parke*, B.—If there had been any special agreement to that effect, it ought to have been stated.]

Montagu Smith, contra, was not called upon.

LORD ABINGER, C. B.—If the plaintiff originally became tenant to the defendant, without any agreement as to the eviction, the law would not afterwards impose such a liability on the defendant as is here stated. No such liability arose from the simple relation of landlord and tenant, and *that*, we think, is the relation on which the

plaintiff has declared. The promise is laid more largely than the law will imply from such a relation. In *Brown v. Crump* (a), a declaration, that in consideration that the defendant had become tenant to the plaintiff of a farm, he undertook to make a certain quantity of fallow, and to spend £60 worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, those obligations not arising out of the bare relation of landlord and tenant. The declaration is therefore bad, and there must be

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Judgment for the defendant.

(a) 1 Marsh. 567.

TREDWEN v. BOURNE.

DEBT for goods sold, and on an account stated. Plea, *nunquam indebitatus*. At the trial before *Rolfe*, B., at the last assizes for Cornwall, it appeared that the action was brought against the defendant as a shareholder in the "Trewalfas Tin and Copper Mining Company," to recover the price of coals, timber, candles, &c., furnished in 1838 and 1839 to the Trewalfas Mine, in Cornwall, belonging to the company. It appeared, from the evidence of the clerk of the company, that it was formed in the year 1837, the prospectus stating that the capital was to be £30,000, in 3000 shares of £10 each. The defendant, who resided at Liverpool, took 100 shares: in all 2000 only were disposed of. There were directors, a secretary

Where a mining company was formed, the capital to be £30,000, in 3000 shares of £10 each; and 2000 shares only were actually subscribed for, of which the defendant took 100:—*Held*, that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go

to the jury to shew that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors.

The members of a *mining* company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines.

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and other officers, and an office in London at which the business of the company was transacted. The mines belonging to the Company were worked, and mineral raised and sold, but no profits were made by the concern. The goods in question were supplied on the order of the directors, and were necessary for the ordinary use of the mine. There was no evidence that the defendant had ever been at the mine, or had attended any meetings of the company; but two letters signed by him and several other shareholders, of the dates of November, 1837, and February, 1838, being requisitions to the directors for a meeting to remove one of their body, were put in. It was objected for the defendant, that there was no evidence to charge him in this action; that there was nothing to shew that the directors, who actually made the contract with the plaintiff, had any authority, express or implied, from the defendant to do so. The learned Judge thought there was evidence to go to the jury, and left the case to them with the direction, that if they were satisfied the defendant was a shareholder, and knew of the concern being carried on by the directors, and the parties in their employ, in the manner it was, he was liable in this action. The jury found a verdict for the plaintiff, damages 182*l.* 4*s.*, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence to charge the defendant.

Crowder now moved accordingly. -- First, this Company having been originally constituted on the condition that it should be carried on with a capital of £30,000, in 3000 shares, and 2000 only having been actually taken, the defendant cannot be liable as a shareholder, unless upon proof that he assented to its being carried on with the smaller amount of capital; *Pitchford v. Davis* (a); and there was no

(a) 5 M. & W. 2.

such proof in this case. It is clear that the mere circumstance of his being a shareholder is not sufficient to render him liable: *Vice v. Lady Anson* (a), *Dickinson v. Valpy* (b), *Bourne v. Freeth* (c). There was no proof that the defendant had attended any meetings of the company; nor were any deeds and documents put in, to shew that he had done any act as a partner. [Parke, B.—His letters clearly shew that he knew the concern had begun, and that he was dissatisfied with the management of it. The sole question is, whether there was evidence to go to the jury of the defendant's having authorized the directors to carry on the concern for his benefit.] There was no evidence whence an authority to them could be implied, to pledge his credit to persons supplying goods on their order.

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But, secondly, a *mining* differs in this respect from an ordinary *trading* partnership. It is in the latter only that the members give each other a general authority to bind them as partners: per Lord Tenterden, C. J., in *Vice v. Lady Anson* (d); *Dickinson v. Valpy*. [Parke, B.—A mining concern is a trading concern.] The business of it is carried on quite differently from that of an ordinary trading firm: regular calls are made as money is wanted for the purpose of the partnership, which are paid down; and the directors have only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders. [Parke, B.—The directors have authority to do all that it is usual to do in the management of mining companies. Alderson, B.—*Dickinson v. Valpy* was the case of a bill of exchange.] The doctrine laid down in the case of *Fleming v. Hector* (e), as

(a) 7 B. & C. 409; 1 M. & R. 113.

(b) 10 B. & C. 128; 5 M. & R. 120.

(c) 9 B. & C. 632; 4 M. & R. 512.

(d) 1 M. & M. 99; 7 B. & C. 411.

(e) 2 M. & W. 172.

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to the committee of a club, applies here. [Lord Abinger, C. B.—A club is not a partnership for acquiring profits. The making of calls is quite consistent with a dealing on credit: the calls may not be demanded until the expiration of the credit.] If the credit of the shareholders may be pledged at all, why may it not by the drawing of a bill, as well as otherwise? [Parke, B.—It may, where the drawing of bills is necessary or usual in carrying on the concern. You do not prove any engagement whereby it was stipulated that the directors should have only the limited authority you contend for: and the question is, whether there was not evidence to go to the jury, that the defendant gave them a more extended authority, viz. to do all that directors of a mining company usually do for carrying on the concern. In *Fleming v. Hector*, the rules of the club were proved, which shewed that the authority of the directors was expressly limited. If the real nature of the transaction here was, that the directors were only to manage a ready-money fund, and you had made that out, the case would be different.] It is submitted that the case is so as it stands. Here money was furnished in the first instance for carrying on the partnership. It is a question of law for the Court, whether the legal inference of authority, which the plaintiff is to make out, has been established.

LORD ABINGER, C. B.—With regard to the first ground of objection, if it had been shewn that the defendant was ignorant of the fact that no more than 2000 shares had been subscribed for, and that the concern was going on upon that footing, that would have been a good ground of defence to this action. But the question is, whether the defendant's letters did not furnish evidence to go to the jury that he was cognizant of its being carried on with a smaller amount of capital than was originally intended; and I cannot say that they did not. As to the second

ground, it is said that a mining company, which, as was decided in *Dickinson v. J'alpy*, is not necessarily formed with the power to pledge the credit of individual members by the drawing of bills—is also not formed with power to bind each other by dealing on credit : but these are two very different propositions. Whether the directors have such a power, must depend on the general nature of the concern ; it is a matter for the jury to decide upon, unless the party gives evidence to shew that their authority was expressly limited : and if it had been left to the jury in this case, I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business. I think, therefore, the defendant has not raised a sufficient foundation to support the second objection. Being a shareholder, it was competent to him to have produced the deed of settlement whereby the members were mutually bound, if it were material to his defence. I should have left it to the jury to judge for themselves whether such companies do not ordinarily deal on credit ; if they do, the shareholders are liable, unless by some evidence the party shews that in the particular case he is not liable.

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PARKE, B.—No doubt the plaintiff is bound to make out his case : the only question is, whether he has not here proved a *prima facie* case ; if he has, the jury had a right to consider it, no answer being given on the part of the defendant. The sole question was, whether there was evidence to go to the jury, that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient. But his letters, which were put in, shewed, first, that he knew the directors were acting in the management of the partnership ; and, secondly, that he was taking a personal interest in the concern : and they were evidence for

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the jury that he authorized the directors to do what they did, for his benefit. It is said that he was deceived as to the amount of capital: but whether he knew the amount actually subscribed or not, there was proof that he authorized the directors to proceed in the management of the concern. Either he knew it, or, not knowing it, chose to authorize the directors to proceed. No point was made at the trial that this was such a partnership as could not deal on credit; if it had, the plaintiff would probably have supplied evidence on that point; and a Cornish jury would probably have said it was the constant practice to purchase materials for mines on credit: at all events, the objection was not taken. There was, therefore, a sufficient *primâ facie* case for the jury. If the defendant had shewn, that by this particular contract the directors were only to deal with the actual fund put into their hands, and that they had no power to pledge the credit of the shareholders, that would have been a defence, because the plaintiff has not trusted to any representation of the defendant, or bargained personally with him. But the sole question being, whether there was a *primâ facie* case for the jury, I think the two letters of the defendant, and the fact of his being a shareholder, in the absence of proof of any limited agreement on his part, constituted such *primâ facie* case, and therefore that there ought to be no rule.

ALDERSON, B. concurred.

ROLFE, B.—I am of the same opinion. The goods supplied by the plaintiff were of daily use in the mine; they were habitually furnished, to the amount of £820; the accounts were regularly sent up to town and audited, and this was only the balance of the last invoice on the books. It is clear what was the usual mode of dealing here, and if it had been put to the jury, there can be no doubt what their finding would have been.

Rule refused.

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LAMB v. VICE and Four Others.

DEBT on bond, in the penal sum of £500. The declaration set out the condition of the bond, whereby, (after reciting that the defendant John Vice was admitted by the plaintiff, knight marshal and one of the judges of the Court of the King's Palace of Westminster, to be one of the bearers of the virges of the household of our sovereign lord the then King, and one of the officers and ministers of the Court of our sovereign lord the then King, and of the King's palace of Westminster, during the will and pleasure of the plaintiff), it was stipulated, that if the defendant, and his followers for the time being, should and would, from time to time and at all times thereafter during the continuance of the defendant John Vice in the said place or office, well, faithfully, and honestly behave themselves in the same place or office, in all things according to the duty of the said place or office; and the defendant should and would faithfully and honestly serve and execute all such writs, process, or warrants issued out of the said Court, as should be delivered unto him, to be executed by him according to his utmost power, and should and would make a due return in all cases where a return thereof was or is required by law; and should and would, upon every arrest by the said John Vice to be made, take sufficient bail of able persons within the jurisdiction of the said Court, where the party arrested should be by law bailable, for the appearance of the party so arrested at the next Court of the said palace of Westminster after such arrest; and should and would duly return and deliver unto the said Court the said bail-bond thereupon so taken, at the next Court day after such arrest made as aforesaid: And further and also, if the said John Vice should and would from time to time and at all times thereafter observe, perform, and obey all the lawful order and orders, rule and rules of the

An officer of the Palace Court entered into a bond, with sureties, to the knight marshal of that Court, conditioned for the due performance of the duties of his office; and (inter alia) that he should take sufficient bail from all defendants arrested, and should obey the lawful orders of the Court. Having taken insufficient bail from a defendant arrested in an action in that Court, an order was made requiring him to pay the amount of debt and costs in the action, which he disobeyed:—*Held*, that the knight marshal was entitled, as a trustee for the plaintiff in the action, to recover, in an action on the bond, the full amount of the debt and costs.

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said plaintiff, or any other judge or judges of the said Court, touching and concerning himself, or his duty and behaviour, in his place as aforesaid,—then that obligation was to be void, &c. The first breach stated, that theretofore, to wit, on &c., within the jurisdiction of the said Court of the Queen's Palace at Westminster, one Richard Deane became and was indebted to one Emanuel Moses in a sum exceeding £20, upon and in respect of certain causes of action before then, and within the jurisdiction of the said Court, accrued to the said Emanuel Moses against the said Richard Deane, to wit, the sum of 46*l.* 16*s.*, upon a bill of exchange for that amount, dated &c., and drawn by J. H. M. upon and accepted by the said Richard Deane, within the jurisdiction of the said Palace Court, payable two months after date to the said J. H. M., indorsed to the said Emanuel Moses for a valuable consideration, which bill, when presented for payment, was dishonoured: that the said Richard Deane being so indebted to the said Emanuel Moses, heretofore and after the making by the defendants of the said writing obligatory, and before the commencement of this suit, and whilst the defendant John Vice was such officer of the said Palace Court as aforesaid, and before the making and passing of the stat. 1 & 2 Vict. c. 110, a certain writ of *capias* was duly issued out of the said Court, directed to the bearers of the virges of her Majesty's household, and the officers and ministers of her Majesty's said Court of her Palace at Westminster, and every of them, and tested in the name of the plaintiff, as such knight marshal as aforesaid, and marked for bail for 46*l.* 16*s.* by affidavit.—The declaration then alleged the delivery of the writ to the defendant John Vice, the arrest of Richard Deane, and the taking of a bail-bond from him and two sureties; and that it was the duty of the defendant John Vice duly to take only good, able, sufficient, and responsible sureties, within the jurisdiction of the said Court, in the said bond for the appearance of the said

Richard Deane, and not to release him from custody and arrest until he had taken such bond with good, able, solvent, and sufficient securities: That the said two sureties, J. H. and T. R., at the time of their so becoming pledges and sureties, and signing the said bond, were not, nor was either of them, nor have they, nor hath either of them, at any time since been, good, able, sufficient, solvent, or responsible sureties, within the jurisdiction of the said Court, for the said R. Deane, but that they were and each of them was, at the time of their becoming such sureties as aforesaid, wholly insufficient for that purpose, and insolvent, bad, and unable sureties in the premises; that the said R. Deane had not appeared; that the said debt had not been paid or satisfied; and that the body of the said R. Deane had not been surrendered in discharge of his bail, or otherwise. By means of which said premises, the said Emanuel Moses hath been and is wholly deprived of the benefit of the said arrest of the said R. Deane, and of the means of satisfying the said debt, and the costs and charges by him in and about his said suit in that behalf expended, and in and about the said arrest of him the said R. Deane, &c.

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The second breach stated the removal of the before-mentioned cause into the Court of Queen's Bench by a writ of habeas corpus cum causâ; notice of special bail thereupon; notice of exception thereto; that they did not appear or justify; a rule of the Palace Court, served on the defendant, to bring in the body of the defendant Deane; that the defendant, not regarding his duty in that behalf, but wrongfully contriving and intending to injure him the said then plaintiff Emanuel Moses, did not bring into Court the body of the said R. Deane, according &c.; and that upon an application to the said Court, at the suit and at the instance of the said E. Moses, it was ordered, in and by a certain rule and order of the said Court &c., that the

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defendant should forthwith pay to the said then plaintiff E. Moses, or his attorney, the sum of 40*l.* 16*s.*, the debt in the said last-mentioned action, together with the costs of such action, to be taxed, and also the costs of and occasioned by the said application in that behalf as aforesaid, to be likewise taxed: that this rule was personally served on the defendant, but that he did not pay, and hath not paid, to the said then plaintiff E. Moses, or to the now plaintiff, or to either of them, the said debt, interest, and taxed costs, amounting to &c., to wit, 66*l.* 9*s.* 4*d.*, although the same was afterwards, to wit, on &c., demanded of the defendant, who had full notice of the premises; and that the defendant had not obeyed the lawful rule and order of the judges of the said Court, as aforesaid, and had therein made default, contrary to the tenor and effect of the said condition, &c.

The defendants having suffered judgment to go by default, a writ of inquiry to assess damages was issued, and came on to be tried before Lord *Abinger*, C. B., at the sittings after last Hilary Term. The order of the Palace Court was put in and proved, and it was shewn to be the practice of that Court, whenever an order of this kind was disobeyed, to allow the party injured to bring an action on the bond, in the name of the Marshal. Under the direction of his Lordship, the damages were assessed at 66*l.* 9*s.* 4*d.*, leave being reserved to the defendant to move to reduce the amount to nominal damages.

Warren now moved accordingly.—This case is one falling within the provisions of the 8 & 9 Will. 3, c. 11, s. 8, which requires the plaintiff to assign or suggest breaches of the condition of the bond: and he is only entitled to recover the amount of actual damage sustained by him, the judgment standing as a security for future damage. Two breaches are assigned: 1st, that the defendant Vice

has taken insufficient bail in the action against Deane, whereby Moses, the plaintiff in that action, has lost the benefit of the arrest; 2nd, that he has disobeyed an order of the Court for payment of the debt and costs to Moses or his attorney, and that no payment has been made to Moses, or to the now plaintiff. It is evident that no damage has arisen or can arise to the now plaintiff, in consequence of either of these breaches of the condition: the damages ought therefore to be nominal. The proper mode of proceeding, for the benefit of Moses, the original plaintiff, was by attachment for disobedience of the rules of Court. The plaintiff was under no obligation at common law or by statute to take such a bond as this, and cannot be considered as a trustee for Moses. A creditor may sue on an administration bond given to the ordinary, *Archbishop of Canterbury v. House* (a); but that is under the authority of the statute 22 & 23 Car. 2, c. 10, which requires a bond to be given in order to protect the interests of creditors and next of kin. So with regard to bail bonds; one of the objects of the stat. 23 Hen. 6, c. 9, was to secure the appearance of the defendant, in order to prevent the plaintiff from being delayed in his suit: it was not, however, until the passing of the 4 Anne, c. 16, s. 20, which made bail bonds assignable, that the plaintiff had the full benefit of the bond. [*Parke, B.*—The party had an equity to sue in the name of the sheriff, without any assignment.] This is not a bond which the original plaintiff had any equity to sue upon, inasmuch as he had, at common law, an effectual remedy by attachment. There is no statute which requires the obligee to take such a bond for the security of third parties: and having himself suffered no substantial injury, he is entitled to nominal damages only. It is not like the case of a sheriff, who is answerable for the acts and defaults of his subordinate

Each. of Pleas,
1840.

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(a) Cowp. 140.

Exch. of Pleas, officers, and therefore entitled to claim an indemnity from
1840. them: the plaintiff is no ministerial officer, but one of the
judges of the Court.

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LORD ABINGER, C. B.—The plaintiff clearly was a trustee for Moses; he might sue on the bond in the plaintiff's name, or the plaintiff might sue for the benefit of Moses. Nothing is more common than for a cestui que trust to sue on a bond in the name of his trustee. If the defendant had pleaded the bankruptcy of the plaintiff, it would have been a good replication that he was suing merely as trustee.

PARKE, B.—The object of this bond is not merely to indemnify the obligee from actual damage to himself: according to the practice of the Palace Court, the Knight Marshal takes such a bond, as a trustee for the suitors who may really be injured by the breach of its conditions. With respect to bail bonds, even before the statute of Anne, there was an equitable right in the party to compel the sheriff to allow him to sue upon the bond in his, the sheriff's, name; in such case the sheriff would surely be entitled to recover, for the benefit of the party, the full amount of damage sustained. The very form of this bond clearly indicates that the plaintiff has taken it as a trustee, for the benefit of third parties.

ALDERSON, B., and ROLFE, B. concurred.

Rule refused.

BROOKE v. MITCHELL.

Exch. of Pleas,
1840.

THIS was an action of trespass. After the issuing of the writ, and before declaration, by a judge's order, dated 27th May, 1839, it was ordered that all matters in difference in the cause should be referred to two arbitrators, "so that they should make and publish their award in writing, ready to be delivered to the parties in difference, or such of them as should require the same, on or before the 1st day of June then next; and in case the said arbitrators should differ respecting the matters thereby referred, then that they should be at liberty, by a memorandum in writing to be indorsed thereon, to appoint an umpire between them in the matters thereby referred, so that the said umpire should make and publish his umpirage in writing, ready to be delivered to the said parties, or such of them as should require the same, on or before the 13th day of July next." The arbitrators differed, and appointed an umpire, who, on the 11th July, 1839, made and executed his award, in the presence of and attested by two witnesses, to whom it was fully made known and declared at the time of its execution. On the afternoon of the 12th, the attornies of both parties received a letter from the umpire, stating that he was about to declare his award, and desiring them to attend at his office at half-past five o'clock on that evening. They accordingly did so, when he read over to them and declared his award, and delivered it to the plaintiff's attorney. At ten o'clock, A. M., on the same day, the plaintiff died.

In Michaelmas Term, *Hoggins* obtained a rule to shew cause why the award should not be set aside, on the ground that it was not made and published in the lifetime of the plaintiff.

W. H. Watson and *Fortescue* shewed cause.—This award was "made and published," within the meaning of those words in the submission, when it was signed by the um-

Where an order of reference required that the arbitrator should make and publish his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day:—*Held*, that the award was "published" and "ready to be delivered," within the meaning of the order, when it was executed by the arbitrator in the presence of and attested by witnesses: and that it could not be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready.

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MITCHELL.

pire, and the execution of it attested, and it thereby became his complete act. The term "publish" does not import the giving of notice to the parties; the submission is satisfied by the instrument's being complete, and ready for delivery if required. It is analogous to the case of a will made under a power requiring it to be signed and *published* in the presence of and attested by witnesses, in which case a delivery of the will in the presence of the witnesses is equivalent to a publication of it: *Curteis v. Kendrick* (a): that being, as *Parke, B.*, there says, "something whereby the party acknowledges that the instrument is a complete act, containing his final mind; that it is no longer ambulatory." But further, it may be doubted whether notice is necessary at all in the case of an award. In declaring upon an award, it is unnecessary to aver that the defendant had notice of the award, unless the submission provides that notice shall be given: 2 Saund. 62 a, n. (4); *Juxon v. Thornhill* (b). In *Child v. Horden* (c), it is said, "If a man be bound to perform the order of J. S., no notice is to be given of this, unless there be a special provision for notice to be given, but he, at his peril, being bound to take notice of this, because he hath undertaken upon himself to perform it; and where such an undertaker is to do and perform a thing, he is to do and perform the same according to his undertaking, without any notice to him given thereof." [*Parke, B.*—The question turns entirely on the meaning to be given to the word "publish." It is only when the act to be done is within the knowledge of one party only, that it is necessary to give notice (d).] The only argument that can be raised on the other side is derived from the words of the stat. 9 & 10 Will. 3, c. 15, s. 2, which limits the time for applying to set aside an award to the last day of the next term after its

(a) 3 M. & W. 461.

(b) Cro. Car. 132.

(c) 2 Bulstr. 143.

(d) See *Vyse v. Wakefield*, ante, 442.

being "made and published to the parties." [Alderson, B.—That is quite reasonable; because otherwise the time might elapse within which the award is to be set aside, without its ever having come to the knowledge of the party.] The cases decided with reference to that clause of the statute—*Musselbrook v. Dunkin* (a), *M'Arthur v. Campbell* (b)—depend entirely on those words: but here all that is required is, that the authority of the arbitrator should be finally exercised, and the award is perfect and complete upon its execution. The other side must contend that there is no award at all until notice.

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Hoggins, contra.—No award was "made and published, ready to be delivered to the parties," until the time when the parties, in pursuance of the letter of the umpire, attended to receive it from him. *Musselbrook v. Dunkin* decides that an award is "published to the parties," only when they have notice that it is ready for delivery on payment of the arbitrator's charges: and *M'Arthur v. Campbell* only establishes that the same rule is applicable, although the charges be unreasonable. Now the terms of this submission amount to the same thing; because not only must there be a publication of the award, but it must be ready to be delivered. The umpire first exercises his own mind, and makes the award; and even supposing he communicated it to the witnesses, that does not satisfy the submission: he might still keep it, and refuse to deliver it to the parties. [Parke, B.—It was ready to be delivered to the parties if they had required it. After execution in the presence of two attesting witnesses, it was a complete act so far as the umpire was concerned: he could not have altered it.] There is no case which says that an arbitra-

(a) 9 Bing. 605; 2 M. & Scott,
740.

(b) 5 B. & Adol. 518; 2 Nev. &
M. 444.

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tor, before notice, cannot cancel the award, and make another. *Blondell v. Brettargh* (a) is an authority in favour of the defendant. Here the award is not to be *received* by the party until the time mentioned in the umpire's letter. [*Alderson*, B.—He only mentions a convenient time for them to come; would he not have delivered it if the party entitled to it had applied sooner?] In *Wilson v. Wilson* (b), where, in debt on bond conditioned for the performance of an award, to be made in writing ready to be delivered to the parties in difference, or such of them as should require the same, on or before such a day, the defendant pleaded, that the arbitrators did make their award on the day limited in the condition, and that he on that day required them to deliver the award to him, but they neglected and refused so to do; and issue being joined thereon, it appeared in evidence that the arbitrators had made their award on the day, but, because it was not stamped, refused to deliver it to the defendant at his request; the jury, under the direction of *Eyre*, C. J., found that the arbitrators had not complied with the condition of the bond, and gave a verdict for the defendant, which was acquiesced in by the plaintiff. The words of the submission in the present case bring it within the principle established by *Musellbrook v. Dunkin*.

PARKE, B.—I am of opinion that this award was sufficiently published, for the purpose of making it valid, in the lifetime of the plaintiff. For that purpose it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he becomes *functus officio*, and has declared his final mind. That is the rule to be collected from the cases of *Brown v. Vawser* (c), and *Henfree v. Bromley* (d);

(a) 7 Ves. 232.

(c) 4 East, 584.

(b) 2 Saund. 327 c, n. (3).

(d) 6 East, 309.

and that is the meaning of the term "publication." Here the instrument was complete as an award, and the umpire could make no alteration in it, after the execution of it; he was then functus officio, having declared his final mind. As to the time of moving to set an award aside, it is quite reasonable that the party should have two terms from the time of notice; and I quite agree with the cases which have so laid it down, by analogy to the terms of the statute of Will. 3, "published to the parties:" but that does not affect the question whether the award is a complete instrument. *Blondell v. Brettargh* was quite a different case from the present, and is no authority either way; for there, in fact, no award had been made before the death of the party; all that the arbitrators had done was to agree upon the minutes of an intended award. *Musselbrook v. Dunkin* was the case of an application to the Court to set aside the award, and the only question there being whether the motion was in time, the Court say that at all events an award is to be considered as published, when the parties have notice that it is ready for delivery on payment of the reasonable charges. But that case is improperly applied, when it is said to lay down the principle that the award is not complete until it is so published. In *M'Arthur v. Campbell*, the Court of King's Bench thought that the instrument was published, for the same purpose, when the arbitrator gave notice that it might be had on payment of his charges, whether reasonable or not. I think that was a correct determination; but the Court of Common Pleas were also quite right in saying, that, at all events, the time had elapsed in the former case.

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ALDERSON, B.—The only difference between the cases of *Musselbrook v. Dunkin* and *M'Arthur v. Campbell*, is, that the Court of Common Pleas thought there was no sufficient notice, until there was such notice, that upon pay-

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ment of the *reasonable* charges, the party had then knowledge of the award: the Court of King's Bench held, that even an *exorbitant* fee must be first paid, and the parties must trust to the Court to deal with the arbitrator. The latter is perhaps the more correct rule, because it leads to less dispute afterwards, whereas the former would make the time for moving to set aside the award depend upon the variable time when the Master might make his report as to the reasonableness of the charges. But all that is laid down in *Musselbrook v. Dunkin* is, that that motion was too late when two terms had elapsed after the Master's report. I apprehend that the meaning of the *publication*, in the rule which regulates the time for an application to set aside an award, is not the publication of the award itself, but, by analogy to the statute, publication *to the parties*, i. e. when they have notice of its contents, and are therefore in a situation to move to set it aside. But on the terms of this submission, the award is *made and published*, when the arbitrator, by some act, has expressed his final determination on the matters referred to him.

GURNEY, B.—After the execution of the award, and its having been read over to the witnesses, there was as complete a publication of it as could be; the umpire could not afterwards revoke or alter it; and it was then ready to be delivered.

Rule discharged with costs.

KNILL v. STOCKDALE.

THIS was an action by indorsee against acceptor of a bill of exchange. The declaration stated that S. J. and

The Court set aside, as frivolous, a demurrer to a count on a bill of exchange by indorsee against acceptor, on the ground that (after stating that J. & C. made the bill) it stated it to be payable to *the drawers'* order, not then naming them: and they refused to let in the defendant to plead a plea which, as he alleged, shewed that the bill was without consideration.

J. C., on the 24th of September, 1839, made their bill of exchange in writing, directed to the defendant, and thereby required the defendant to pay to *the drawers' order* 101*l.* 2*s.* 6*d.*, for value received. It then alleged, in the usual terms, the acceptance by the defendant, the indorsement by the drawers to the plaintiff, and the non-payment.

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The defendant demurred specially to the count, on the ground that the defendant was required to pay to the drawers' order, yet the count did not state the drawers' names; and that in this respect it was in an unusual form, and not conformable to the precedents.

A rule having been obtained to set aside the demurrer as frivolous,

Gurney shewed cause, and produced an affidavit of the defendant, stating, that the goods for which the bill was given were bought by the defendant of S. J. and J. C., as brokers and agents of H. & Co., and that he the defendant was not to be called upon for payment of the price of the goods, until after account sales had been furnished by H. & Co. of the sale of the goods; and on the defendant accepting the bill at the request of S. J. and J. C., the bill was to be renewed from time to time until the goods were sold and account sales rendered; that the bill was indorsed to the plaintiff without consideration or value; and that the goods had not, to the knowledge of the defendant, been sold, nor had account sales been rendered.—*Gurney* contended, first, that the declaration was in form contrary to the precedents, and the demurrer could not be said to be frivolous. [*Parke*, B.—The declaration is quite certain enough; it states that J. & C. made, that is, drew, the bill, and that it was made payable to the drawers', that is, their own, order. The rule must be absolute.] He then applied to be let in to plead *de novo*, upon the grounds stated in the affidavit, which shewed there was no consideration for the bill.

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[*Parke, B.*—The affidavit states a parol agreement for altering the term of the bill as it appears on the face of it: it has been expressly decided that such an agreement cannot be given in evidence to vary the contract expressed in the bill: *Moseley v. Hanford* (a). At all events, you ought to have taken your stand before, and pleaded to the declaration.]

PER CURIAM,

Rule absolute.

(a) 10 B. & C. 729.

ERDY v. MARTIN.

A writ of ca. sa., issued after the passing of the 1 & 2 Vict. c. 110, but before the promulgations by the Judges of the forms of writs of H. T., 3 Vict., commanded the sheriff to take the defendant to satisfy the debt and costs, together with interest at the rate of £4 per cent., and to have that money, with such interest, before the Court, &c., and to all such things as by the statute of 1 & 2 Vict. he was authorized and required to do in that behalf:—

Held, that the party might alter the writ, conformably to the additional remedies given by the statute, although no new form had yet been promulgated by the Judges: and that the above form of writ was good.

IN this case the defendant had been arrested upon a writ of capias ad satisfaciendum, tested in November, 1839, (after the passing of the stat. 1 & 2 Vict. c. 110, but before the issuing of the new forms of writs framed by the Judges under that statute), which, after commanding the sheriff, in the usual form, to take the defendant, &c., to satisfy the plaintiff the debt and costs, proceeded thus—
“together with interest upon the said two several sums of money, at the rate of £4 per cent. per annum, from the 28th day of November, in the year of our Lord 1839, on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said J. Erdy, for his damages and interest as aforesaid, and that you do all such things as, by the statute passed in the second year of our reign, you are authorized and required to do in this behalf.”

W. H. Watson moved to set aside the writ, and discharge the defendant out of custody, on the ground of irregularity. This writ neither follows the old precedents, nor the new form promulgated by the Judges, which, however, did not come into operation until the first day of the present term. [*Parke*, B.—The 17th section of the 1 & 2 Vict. c. 110, enacts, that every judgment debt shall carry interest at the rate of £4 per cent. per annum, from the time of entering up judgment: and as the statute gives the additional right to interest, what objection can there be to the writ being altered accordingly? The Judges are empowered by the statute to frame new forms of writs, and when they are promulgated they must be followed: but in the meantime, why should not the plaintiff have the benefit of the statute, making the necessary alteration in the writ? There is nothing in the statute to compel the use of the old form, until the new writs are framed: the 20th section enacts, “that such new or altered writs shall be sued out of the Courts of law, &c., as may by such Courts be deemed necessary or expedient for giving effect to the provision of the act, and in such forms as the Judges of such Courts respectively shall from time to time think fit to order.” But for that provision, parties would not be bound by the forms issued by the Judges, but might adapt the writ to the present state of the law.] The statute undoubtedly enacts, that every judgment debt shall carry interest, yet the sheriff cannot levy it under a writ of ca. sa. [*Alderson*, B.—The form of the writ is in accordance with the present practice.] Under a writ of ca. sa. it is the duty of the sheriff not to take the money; it is an escape if he does. [*Parke*, B.—The effect of the writ is to keep the defendant in custody until he pays the debt and the interest also.] This writ also requires the sheriff to do all such things as by the statute he is required the new form contains no such words as those.

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PARKER, B.—I am of opinion that no rule ought to be granted. The legislature having given a more extensive remedy on executions, the plaintiff was at liberty to alter his writ accordingly, although the Judges had not promulgated any new form of writ for that purpose. Indeed, I am disposed to think that the rule of Hilary Term, 2 Vict., was itself sufficient to authorize him to make the necessary alteration.

ALDERSON, B., concurred.

Rule refused.

MORTIMORE v. WRIGHT.

The moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child: and he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them.

The defendant's son, an infant of 20 years of age, had lodged for some time with the plaintiff, during a part of which he had earned wages, and paid for his board, &c. He afterwards fell ill, and was unable to pay for the necessaries with which the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer, that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be 21, and would then be able to pay what he owed the plaintiff himself:—*Held*, that this letter was no admission of a liability in the father.

DEBT for board and lodging furnished to the infant son of the defendant, and for nursing, attendance, and necessaries supplied to him during sickness, with counts for money paid and on an account stated. Plea, nunquam indebtedatus. At the trial before Rolfe, B., at the Middlesex Sittings in Hilary Term, it appeared that the defendant's son, who was between nineteen and twenty years of age, lodged with the plaintiff from May, 1837, to September, 1839, when he came of age. For the last six or seven months of that time he was too ill to follow his usual occupation, and was supplied with necessaries and attendance by the plaintiff, without making any payment for them. He had previously earned £1 a week, and had from time to time paid his bills to the plaintiff. No proof was given of any orders from, or request by, the defendant to the

board, &c. He afterwards fell ill, and was unable to pay for the necessaries with which the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer, that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be 21, and would then be able to pay what he owed the plaintiff himself:—*Held*, that this letter was no admission of a liability in the father.

plaintiff to supply his son with anything: but the following letter from him to the plaintiff was relied on as an admission of his liability:—

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“Yoxford, August 9, 1839.

“Mrs. Mortimore,—I am sorry to hear Joseph is in such a bad state of health. You have wrote to me for money, but I cannot advance any at this time, being so near harvest that the farmers want all they have to pay their men; but Joseph will come in possession of upwards of £80 on September the 6th, 1839, being 21 years old that day, and then he can pay you what he owes you himself.—Yours respectfully,

“WILLIAM WRIGHT.”

It was contended for the defendant, that there was no evidence to go to the jury of any contract by which the defendant was bound to pay the debts in question, and that the plaintiff ought to be nonsuited. The learned Judge inclined to that opinion, but on the authority of *Blackburn v. Mackey (a)*, which was cited for the plaintiff, he declined to nonsuit. The plaintiff's letter, to which the above was an answer, was then put in as a part of the defendant's case:—

“Great Ormond Yard, August 6th, 1836.

“Sir—I am extremely sorry to be obliged to trouble you in this manner; but ever since the first night your son Joseph came to London, I have had him lodging in my house: I have acted to him in every respect the same as a mother, and for the last six months he has not been able to pay me one penny, and during his illness I boarded and attended to him; that he now owes me 10*l.* 1*s.* 9*d.*, and part of it lent money: and I am so much distressed by losing so much by others, that has

(a) 1 C. & P. 1.

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compelled me to write to you, which Joseph's cousin can vouch for, as he is well acquainted with the parties. Sir, if you will be so kind as to advance me the money, or a part of it, you will certainly do an act of charity, for I am in the greatest want of it. If you can persuade your son to come home, I think he might soon be better, otherwise I think he will soon go into a decline, for he looks very ill. Sir, if you will please to send me an answer as soon as possible, you will much oblige your humble servant,

"ELIZABETH MORTIMORE."

The learned Judge directed the jury, that before they could find for the plaintiff, they must be satisfied that the defendant, by his letter, meant to admit an original liability on his part to pay his son's debts. The jury, however, found for the plaintiff, damages 13*l.* 6*s.*, the learned Judge reserving leave to the defendant to move to enter a nonsuit. In Hilary Term, *Knowles* obtained a rule accordingly, or for a new trial, against which

Lee and *Horry* now shewed cause.—The letter of the defendant was sufficient evidence of liability to go to the jury, and the learned Judge was right in refusing to nonsuit. The case of *Blackburn v. Mackey*, which was cited at the trial, is directly in point. There, a letter written by the father of a young man under twenty-one, who had been supplied with clothes by a tailor, certainly not containing terms any stronger in acknowledgment of a liability than this, was held by Lord *Tenterden* to be evidence for the jury, to say whether it admitted an original liability. The fair inference from the defendant's letter was, that if he had been in funds, he would have paid the plaintiff. [Lord *Abinger*, C. B.—In the case cited, there was an express promise to pay the first bill, if sent.] Although it was clear no contract existed on his part before. [*Parke*, B.—The words were equivocal; it might be either that he was willing to pay as a favour, or that

he made no objection in fact or in law to his liability on the first bill.] But further, here the son continued afterwards to board with the plaintiff; and after notice to the father of the son's illness, and that necessaries were being supplied to him, he ought to have directly repudiated any liability, otherwise he is bound to pay for them. In *Nichole v. Allen* (a), which was an action for board and lodging furnished to an illegitimate child of the defendant, it was proved that he knew of her being with the plaintiff, and had formerly allowed £12 a year for her support; and Lord *Tenterden* there said—"Leaving out of the case all about the allowance, it stands thus: he knows where she is, and allows her to remain there:" and again—"There is not only a moral but a legal obligation on the defendant to maintain his child; he knows where she is, and he expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shewn that she is maintained in the plaintiff's house, and he knows it; and it then lies on the defendant to shew that she is there against his consent, or that he has refused to maintain her any longer at his expense." [Lord *Abinger*, C. B.—That is only a *nisi prius* decision, and I cannot assent to any such doctrine.] *Law v. Wilkin* (b) was a decision in banc. There a boy at school had been supplied with clothes by the plaintiff, had taken them home at the holidays, and brought them back to school; and it was held, (overruling the opinion of *Parke*, J., who had nonsuited at the trial), that these facts were evidence to go to the jury of an implied authority from the father to furnish the clothes. [Lord *Abinger*, C. B.—If that be so, I am sorry for it: I cannot concur in the decision. *Parke*, B.—But for that decision, I certainly should have thought there was no single fact in that case to shew the authority of the father,

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(a) 3 C. & P. 36.

(b) 6 Ad. & E. 718; 1 N. & P. 697.

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but only mere conjecture.] Here the defendant's letter raises an inference that the previous payments by the son were payments by the father through the instrumentality of the son.

Then, as to the question of a new trial, the two letters taken together, with the fact of the defendant's allowing his son to remain with the plaintiff, after her request that he would take him home on the ground of his ill health, were sufficient evidence from which the jury might reasonably infer that he authorized his continuing there at his charge.

Knowles, contra, was stopped by the Court.

LORD ABINGER, C. B.—I am clearly of opinion that there was no evidence for the jury in this case, and that the plaintiff ought to have been nonsuited. The learned Judge was anxious, as Judges have always been in modern times, not to withdraw any scintilla of evidence from the jury; but he now agrees with the rest of the Court, that there ought to have been a nonsuit. In the present instance, I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. In the present case, it is not pretended that there is any evidence whatever to charge the defendant, independently of the letter written by him, which is relied on for that purpose: but the interpretation which is sought to be

put upon that letter is in no respect warranted by the terms of it. [His Lordship read the letter.] There is nothing whatever in this letter to shew any intention to acknowledge a debt due from the writer; on the contrary, the father insists that the son, and not himself, is the debtor, and refers the plaintiff to the son for payment. This is rendered even more clear by the former letter of the plaintiff, to which the defendant's is an answer; and it is manifest that no admission of any liability whatever was intended, or even expected. With regard to the case in the Court of King's Bench, of *Law v. Wilkin*, if the decision is to be taken as it is reported, I can only say that I am sorry for it, and cannot assent to it. It may have been influenced by facts which do not appear in the report; but as the case stands, it appears to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative: which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted: but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty, if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices.

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1840.

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PARKE, B.—I am of the same opinion, and concur in the observations which have fallen from my Lord Chief Baron; although I should have acted as my Brother Rolfe did at the trial, in declining to nonsuit, from the doubt created by the case of *Blackburn v. Mackey*, and in the expectation that the jury would find for the defendant, which they undoubtedly ought to have done, after the additional evidence given by him. We are now, however, to decide whether, at the time when that objection was taken by Mr. Knowles at the trial, there was any evidence to go to the jury; and I am of opinion that there was not. It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts; except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability. Then, did the evidence in this case carry it further? All the facts which were in evidence at the trial were directly opposed to the notion that the defendant had admitted any liability on his part, with the exception of his letter, which, as explaining its own purport, was rightly admitted in evidence, without that to which it was an answer. That letter is to be read according to the ordinary import of its language; and so reading it, I cannot find in it any admission of liability: it is not even equivocal in its terms, but directly refers to the debt in question as one which the son himself owed; and it is quite consistent with every word of it, that the father was willing to make an advance to the plaintiff by way of gift, if it had been in his power. There was no proof of any contract in this case, which was absolutely necessary to render the defendant liable; and whatever may be the moral obligations of parties, juries must not be allowed to make them contract without legal evidence. The present case is distinguishable from *Blackburn v.*

Mackey, which may possibly be supported, although I doubt much whether, even in that case, there was any evidence for the jury.

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ROLFE, B.—I am of the same opinion. Had it not been for the case of *Blackburn v. Mackey*, which was cited at the trial, I should certainly have nonsuited the plaintiff; but, upon reflection, I doubt whether in that case there was any evidence for the jury, and I am clearly of opinion that none was given in this case. After the evidence given for the defendant, the case became still stronger against the plaintiff, and I quite expected a verdict for the defendant.

Rule absolute to enter a nonsuit.

REGINA v. THEOPHILUS LANE.

WADDINGTON applied for an order of this Court for the sale of a leasehold interest, which had been extended at the suit of the Crown. The defendant having been a defaulter, an extent issued in the year 1768, under which a lease renewable on lives, held by him from the Custos and Vicars of the Collegiate Church of Hereford, was seized by the Crown, and the profits had been ever since taken by receivers appointed by the Crown, and the leases regularly renewed to them. The question was, whether a leasehold interest came within the words of the statute, 25 Geo. 3, c. 35, s. 1, which empowers the Court to direct the sale of the "right, title, estate, and interest" of any debtor to the Crown, and of his heirs and assigns, in any "lands, tenements, or hereditaments, which have been or shall hereafter be extended under any writ of extent," &c. The lands were required for the site of a new church.

Under the stat. 25 Geo. 3, c. 35, s. 1, the interest of a crown debtor in leaseholds renewable on lives, may be sold.

The Court refused, at the instance of the Crown, to direct a sale by private contract, but referred it to the Remembrancer to certify which was the most advantageous mode of selling the property.

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PARKE, B.—The crown debtor has still an equitable interest in the renewals; the crown receiver would be a trustee for him as to the surplus after satisfaction of the debt of the Crown. The legal interest of the receiver would be disposed of by his own act, independently of any order of the Court; but you want the order, in order to dispose of the equitable interest of the crown debtor. You may take an order.

Order granted.

On a subsequent day, *Waddington* applied for an order of the Court to the Queen's Remembrancer, to direct a sale by private contract. That officer, considering a sale by auction the usual course, had declined to order a private sale without the authority of the Court.

The Court directed that the Remembrancer should certify to them which mode of selling the property was, in his judgment, the most advantageous for the interests of all parties.

WILD and BAUGH v. WILLIAMS and Another.

The Court will not set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant. Fraud upon the releasor is not a ground for setting aside the plea, since that may be replied.

SIR F. Pollock had obtained a rule to set aside a plea puis darrein continuance in this action, of a release given by the plaintiff Baugh to the defendants. The action was for work done by the plaintiffs, under a joint contract, for the defendants. The work was begun in February 1837; in May 1838, Baugh ran away, only £7 being then due to the plaintiffs: the plaintiff Wild worked on until the following August, and now brought this action in the joint names of himself and Baugh, for an alleged balance due in respect of the whole work. Baugh had made an affidavit in support of this application, in which he deposed when he executed the release, he did not know that he

was signing anything more than an acknowledgment that no money was due to him for any work done after he went away.

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R. V. Richards shewed cause.—The Court will not set aside this plea, unless a case of gross fraud be made out, which is not the case here: *Herbert v. Pigott (a)*, *Jones v. Herbert (b)*. Besides, it must, at all events, appear that Baugh was a mere name, having no real interest in the action, whereas this is a case of two joint contractors. *Innell v. Newman (c)*, which may be referred to, is quite distinguishable; there the action was brought by a feme covert, as executrix, in the name of her husband, from whom she lived apart, under an agreement that she should enjoy, as her separate property, all effects she might acquire. [He was then stopped by the Court.]

Sir *F. Pollock* and *Whateley*, contrà, urged, that Baugh clearly had no real interest in the action, and that Wild was in substance the only plaintiff, and Baugh a mere trustee for him.

LORD ABINGER, C. B.—We should be pushing the case much further than authority or principle warrants, if we yielded to this application. It is not enough that the releasing party, on taking the accounts, would be a debtor to his co-contractor. If this was a fraudulent release, the plaintiffs can raise that issue on the plea.

PARKE, B.—If there was fraud on Baugh himself, so that he is not bound by the release, that will be a good replication. This is an application to the equitable jurisdiction of the Court, and, in order to its being granted,

(a) 2 C. & M. 384.

(b) 7 Taunt. 421.

(c) 4 B. & Ald. 429.

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fraud must be shewn as between the releasor and the releasee. That is not done; not even the first essential step is made out, namely, that Baugh was in fact a mere trustee, much less that the defendants knew him to be so.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged with costs (a).

VAUGHAN v. WATT.

On the 24th July goods were pledged with the defendant, a pawnbroker, in the name of Mary Warne, and the duplicate was made out accordingly. She was, in fact, the wife of the plaintiff Vaughan, but it did not appear that this fact was then known to the defendant. A few days afterwards, the same person applied to the defendant for a copy of the duplicate, and a form of declaration of the loss of it,

pursuant to the stat. 39 & 40 Geo. 3, c. 99, s. 16, and 5 & 6 Will. 4, c. 62, s. 12. On the 6th August, the plaintiff produced the duplicate to the defendant, and demanded the goods, tendering the money advanced on them and interest, but the defendant refused to deliver them, on the ground of the declaration having been obtained. The plaintiff applied to a magistrate to compel him, and the defendant then (on the 9th August) learnt that the party who pledged the goods was the plaintiff's wife:—*Held*, that upon these facts, the Judge at the trial was wrong in directing the jury that the detention of the goods was in point of law a conversion; and that he ought to have left it to them to say whether the defendant had a bona fide doubt as to the title to the goods, and if so, whether a reasonable time for that doubt to be cleared up, by the party's going before a magistrate and verifying the declaration, pursuant to the 39 & 40 Geo. 3, c. 99, s. 16, had elapsed on the 6th of August; and if it had, that the refusal then to deliver them to the plaintiff amounted to a conversion.

(a) See *Crook v. Stephen*, 5 Bing. N. C. 688.

s. 16 (a), and 5 & 6 Will. 4, c. 62, s. 12 (b). Some days afterwards, upon an allegation that this document also

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(a) Which enacts, "that in case any such note or memorandum as aforesaid shall be lost, mislaid, destroyed, or fraudulently obtained from the owner or owners thereof, and the goods and chattels mentioned therein shall remain unredeemed, then and in every such case the pawnbroker or pawnbrokers with whom the said goods and chattels were so pledged, shall, at the request and application of any person or persons who shall represent himself, herself, or themselves to the pawnbroker as the owner or owners of the goods and chattels as aforesaid, deliver to such person or persons so requesting and applying for the same, a copy of the note or memorandum so lost, mislaid, destroyed, or fraudulently obtained as aforesaid, with the form of an affidavit of the particular circumstances attending the case, printed or written, or in part printed and in part written on the said copy, as the same shall be stated to him or her by the party applying as aforesaid; for which copy of such note or memorandum, and form of affidavit, in case the money lent shall not exceed the sum of five shillings, the pawnbroker shall receive the sum of one halfpenny; and in case the money lent shall exceed the sum of five shillings, and not exceed the sum of ten shillings, the pawnbroker shall receive the sum of one penny; and in case the money lent shall exceed the sum of ten shillings, the pawnbroker shall receive the like sum of money as he is entitled to receive and take on giving the original

note or memorandum, such money to be paid by the party applying for the same at the time of making the said application; and the person or persons having so obtained such copy of the note or memorandum, and form of affidavit, as aforesaid, shall thereupon prove his, her or their property in, or right to such goods and chattels, to the satisfaction of some justice of peace for the county, riding, division, city, town, liberty, or place where the goods or chattels shall have been pledged, pawned, or exchanged, and shall also verify on oath or affirmation, as the case may be, before the said justice, the truth of the particular circumstances attending the case mentioned in such affidavit or affirmation, to be made as aforesaid, the caption of such oath or affirmation to be authenticated by the handwriting thereto of the justice before whom the same shall be made, and who shall and is hereby required so to authenticate the same; whereupon the pawnbroker shall suffer the person or persons proving such property to the satisfaction of such justice aforesaid, and making such affidavit or affirmation as aforesaid, on leaving such copy of the said note or memorandum, and the said affidavit or affirmation, with the said pawnbroker, to redeem such goods or chattels.

(b) Which substitutes, in lieu of any oath, affirmation, or affidavit, required by any acts for regulating the business of pawnbrokers, a declaration to the same effect.

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was lost, she obtained from the defendant another similar form. On the 6th of August, the plaintiff Vaughan produced the duplicate to the defendant, and demanded the goods, tendering the amount of the pledge and the interest. The defendant refused to give them up, on the ground of the declarations having been obtained from him. On the 7th, the plaintiff made an application to the police magistrate at Hatton Garden, for the purpose of compelling the restoration of the goods, and a summons was granted for the defendant's appearance on the following day, when he attended accordingly, but was compelled to go away before the case was called on. On the 9th, however, the parties again attended before the magistrate; and the plaintiff then stated that it was his wife by whom the goods had been pledged. The magistrate, however, after hearing the circumstances, declined to interfere. The plaintiff then brought this action, the writ being sued out on the 21st August. It was contended for the defendant, that there was no evidence of such an absolute refusal by him to deliver up the goods to the plaintiff, as constituted a conversion; and that he was justified in refusing to do so, by the circumstance of the declarations having been obtained by another party claiming to be the owner. The learned Judge thought that the mere fact of these documents having been obtained was no defence as against the real owner of the goods, who might, in that case, never have it in his power to recover possession of them: and under his Lordship's direction, a verdict was found for the plaintiff, damages £10, leave being reserved to the defendant to move to enter a nonsuit. The jury were discharged as to the second issue.

G. T. White having accordingly obtained a rule for a nonsuit, or for a new trial, (citing *Isaac v. Clark (a)*, and *Green v. Dunn (b)*),

(a) 2 Bulst. 312.

(b) 3 Camp. 215, n.

Pike now shewed cause.—It is admitted that the plaintiff is the real owner of the goods. The 15th section of the 39 & 40 Geo. 3, c. 99, declares that the person producing the original note or memorandum of the goods pledged, as the owner thereof, to the pawnbroker, shall be deemed and taken to be, as against him, the real owner of the goods, and the pawnbroker is thereby required, on satisfaction of the principal sum advanced and the profit, to deliver them to such person. The plaintiff complied in all respects with the directions of this section. And the 16th section of the same act, upon which reliance is placed for the defendant, does not entitle the pawnbroker to retain the goods against the real owner, unless where the party obtaining the form of affidavit therein mentioned, shall have proved his right to them to the satisfaction of a justice. Even assuming, therefore, that the defendant was ignorant that the party who pledged the goods was the wife of the plaintiff, he is not entitled to withhold them.

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White and Cockburn, contra.—There was no such refusal to deliver up the goods proved in this case, as amounted to a conversion. [*Parke*, B.—All that the pawnbroker can be entitled to do is, to keep the goods for a reasonable time, until the party shall have gone before a magistrate to verify the declaration. You did not ask the learned Judge to leave it to the jury whether such reasonable time had elapsed. This declaration, in London, ought to be acted on immediately. If the question had been left to the jury, there was abundant evidence for them to find that more than a reasonable time had elapsed.] If a party, at the time when he refuses to deliver goods on demand, has a reasonable doubt whose property they are, even if he obtain a knowledge of the fact the next day, that refusal cannot be treated as a conversion, without a subsequent

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demand: *Green v. Dunn, Alexander v. Southey* (a). If the defendant was justified in the refusal at that moment, it is a sufficient defence. The learned Judge ought therefore to have left it to the jury, as was done in the latter case, whether the qualification of the defendant's refusal was a reasonable one. In *Green v. Dunn*, the plaintiff was clearly the real owner of the goods; yet because the defendant's refusal to deliver them was a qualified one, it was held that there was no conversion. This was a refusal, not absolute, but qualified, and bonâ fide, not with the view of withholding the property from the real owner, but for the purpose of protecting it for the real owner, whoever he might be. It is the *duty* of the pawnbroker to take precautions that by the loss of the duplicate the loss of the goods does not result to the owner. Suppose this were a case of a simple bailment at common law, independently of the statute—a deposit of goods, with a written engagement to re-deliver them on demand; and they were surreptitiously obtained from the bailee by another party, and notice thereof given to the bailor, a refusal to re-deliver them on that ground clearly would not be a conversion, according to the cases already cited; and this is in effect the same case. Whether the defendant had the bonâ fide intention of retaining the goods for the real owner was, at all events, a question for the jury, and ought to have been left to them.

Lord ABINGER, C. B.—It is with great regret that I bring myself to concur in making this rule absolute for a new trial. The verdict is only for £10, and the event must necessarily be the same on a new trial, the same facts being proved. If the question had been brought before the jury, whether a reasonable time had elapsed for

(a) 5 B. & Ald. 247.

the defendant to ascertain the title to the goods, nobody can doubt that they would have come to the same conclusion. It must be admitted, however, that this, being a question for the jury, ought to be left to them. The mere detention of the goods, abstractedly, was not a conversion, if the delay was only for a reasonable time: here, I think, the time was unreasonable.

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PARKE, B.—The learned Judge was incorrect in telling the jury, that the mere refusal to deliver the goods to the real owner was a conversion. It was a question for the jury, whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought therefore to have been left to the jury, whether the defendant had a *bonâ fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed. The party obtaining the declaration is bound to go before a magistrate, and satisfy him by evidence that he is the real owner of the goods; and if a reasonable time had elapsed in this case for doing so, the defendant had no longer any reasonable ground for detaining them on the 6th of July, for a supposed defect of title. That was a question for the jury. The statute supposes that the party will go before the magistrate immediately; and if three or four days elapse without his doing so, the jury would be well warranted in finding that the reasonable time had elapsed. But it is all for the jury: however strong the facts, the Judge cannot take it upon himself to refuse to leave the question to them. Therefore, although the result will clearly be the same, in strict law the defendant is entitled

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1840. therefore be a new trial.

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ROLFE, B.—I concur in the decision of the Court, and very much also in the regret that there should be a new trial, where the matter in question is so small, and the result must be the same. According to the act of Parliament, the party obtaining the form of declaration “shall *thereupon* prove his property in or right to the goods, to the satisfaction of some justice of the peace,” and then the document, authenticated by the signature of the justice, is to be an indemnity to the pawnbroker. Here the goods were pawned on the 24th of July: on the 6th of August they were demanded by the plaintiff: at some undefined time between those dates, the application was made for the form of declaration, but no proceedings were taken thereupon; and there was what was equivalent to a repetition of the refusal to deliver the goods, on the 7th, 8th, and 9th of August. I certainly did not leave it to the jury to say whether a reasonable time had elapsed—not for him to inquire into the title, but for the party to do that which he was bound to do *thereupon*, on obtaining the declaration; because it appeared preposterous to leave to the jury the question, whether a reasonable time had elapsed for doing that which ought to be done immediately, when a period had elapsed which was indeed undefined, but might be any time from ten to fifteen days. However, the matter was, strictly, for the jury, and I agree, as it was not left to them, that there must be a new trial.

Rule absolute for a new trial.

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QUARMAN v. BURNETT and Another.

CASE.—The declaration stated, that the plaintiff, on the 21st December, 1838, was possessed of a carriage, to wit, a chaise, of great value &c., and of a horse then drawing the same, in which said carriage the plaintiff was then riding: and that the defendants were also possessed of a carriage, to wit, a chariot, to which said carriage of the defendants were harnessed two horses, and which said carriage and horses *were then under the care of the defendants*. Nevertheless the defendants so carelessly &c. conducted themselves in the premises, that by and through the mere carelessness, negligence, want of proper caution, and improper conduct of the defendants in that behalf, the said horses so harnessed to the carriage of the defendants started off with the said carriage, *without a driver or other person to manage, govern, or direct the same*, whereby the said carriage of the defendants then ran and struck with great force against the said carriage of the plaintiff, and thereby greatly crushed and injured the same, and the plaintiff was thrown with great force and violence out of his carriage upon the ground, &c. &c.

Pleas, first, not guilty; secondly, that the said carriage and horses in the declaration mentioned, or either of them, were not under the care of the defendants, or either of them, in manner and form, &c.; upon which issues were joined.

At the trial before *Maule*, B., at the Middlesex Sittings in last Michaelmas Term, the following appeared to be the material facts of the case:—

The defendants are elderly ladies resident in Moore Place, Lambeth, keeping a carriage of their own, but hiring horses and a coachman from a job-mistress of the name of Mortlock. They generally had the same horses,

Where the owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party, it was held that the owners of the carriage were not liable to be sued for such injury.

And it was held to make no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery, which he left at their house at the end of each drive; and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house.

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and always the same coachman, a man of the name of Kemp, (the only regular coachman in Miss Mortlock's employ), to whom they paid 2s. for each drive, having told him when they first set up their own carriage, three years ago, that they would pay him that sum. He received regular weekly wages from Miss Mortlock. The defendants sometimes took the coachman and horses into the country for several weeks, when they paid him a certain sum per week. They had a plain coachman's coat and a livery hat, for which Kemp was measured, and which he wore when driving the defendants, and took off on his return to their house, where the coat and hat were hung up in the passage. On the 21st December, 1838, he went into the defendants' house to pull off the hat, (he did not wear the coat that day, having his own box coat on), and left no one in charge of the horses: they started off, ran against the plaintiff's chaise, which was drawn up on the side of the footpath, threw him out, and seriously injured him, and damaged the chaise.

This being the state of facts, it was contended for the defendants that Kemp was, under the circumstances, the servant, not of the defendants, but of the job-mistress, and that the defendants were not responsible. The following cases were referred to: *Laugher v. Pointer* (a), *Smith v. Lawrence* (b), *Brady v. Giles* (c), *Fenton v. Dublin Steam Packet Co.* (d), *Randleson v. Murray* (e). The learned Judge thought there was evidence to go to the jury, but gave the defendants' counsel leave to move to enter a nonsuit: it appearing to him that there was some evidence that the carriage was under the defendants' care, both in respect of their choosing this particular coachman, and also in respect of his having gone to put

(a) 5 B. & C. 547.

(b) 2 Man. & R. 1.

(c) 1 M. & Rob. 494.

(d) 8 Ad. & E. 835; 1 P. & D. 103.

(e) 8 Ad. & E. 109; 3 N. & P.

239.

back their hat, and left the carriage unattended to. And he told the jury, that if the coachman was, at the time the horses ran away, acting as the servant of the defendants, they were liable: and that he thought he was acting as such servant, if the job-mistress appointed him specially at the defendants' desire, or if in putting back his hat he acted for the defendants. The jury found a verdict for the plaintiff, damages 198*l.* 9*s.*

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Kelly having obtained a rule nisi for entering a nonsuit, pursuant to the leave reserved,

Thomas (Sir *F. Pollock* being with him) shewed cause at the sittings after Hilary Term.—The direction of the learned Judge was right, and the verdict ought to stand. The only question is, whether the carriage and horses could be said to be in the care of the defendants, in the sense imputed by the declaration. The important case on this subject is that of *Laugher v. Pointer*, in which the judges of the Court of King's Bench were equally divided. There the owner of the carriage hired a pair of horses of a stable keeper to draw it for a day, and the latter provided the driver, who was paid by gratuities given by the owner of the carriage. Lord *Tenterden* and *Littledale, J.*, held that the owner of the carriage was not liable to be sued for an injury done by his negligent driving; *Bayley, J.*, and *Holroyd, J.*, being of a contrary opinion. The present case, however, is distinguishable from that, and falls within the exceptions stated by the two former learned Judges to the doctrine they there laid down. Lord *Tenterden* says—"In the case now before the Court, the hirer makes no contract with the coachman; *he does not select him*; he has no privity with him; he usually gives him a gratuity, but he is not obliged by law to give him anything; and from thence I conclude that the coachman is not the servant of

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the hirer; and if the coachman is not the servant of the hirer on such an occasion, but is chosen and intrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses." And again—"Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages, and *the furnishing a livery*, may also be circumstances worthy of attention, because they also may, in some cases, be considered as evidence of a choice and a contract." In the present case the defendants exercised a choice in the selection of this particular coachman; they paid him, by agreement, a certain sum for each drive; and they supplied him with livery, which he was changing in the house when this accident occurred. The case, therefore, goes far beyond that of *Laugher v. Pointer*, and falls within the observations of all the judges in that case. In *Randleson v. Murray*, the defendants, who were occupiers of a bonded warehouse in Liverpool, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. While being lowered, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held liable, Lord Denman, C. J., saying, "It makes no difference whether they employed people of their own to move their goods, or procured others who were likely to move them more expertly, and left it to their superintendence." In *Fenton v. Dublin Steam Packet Company*, where the plaintiff's vessel was sunk by a steam-boat, of which the defendants were owners, but which was at the time chartered

to another for a voyage, his Lordship says—"The charterer may be answerable also; but unless the charter-party has *interfered with* the general control of the owners, they are clearly liable." [*Alderson*, B.—"Interference" there means some interference which causes the injury.] Such was the case here, the injury having occurred while the coachman was absent for the defendants' benefit. It was their duty to send somebody to take care of the horses, while he was acting in compliance with their directions for their benefit. If a party holds himself out to the world as the owner of a vehicle, by the negligent driving of which damage is occasioned, he is liable, though he has ceased to be the actual owner: *Stables v. Eley* (a). Here the defendants were clearly, in every respect, the ostensible owners of the carriage and horses. But further, the terms of their agreement with the coachman, giving him a stated sum for each drive, which was evidently a regular part of his livelihood, made him their servant. In *Brady v. Giles* (b), a case similar to the present, Lord Abinger, C. B., refused to nonsuit, holding it to be, in all such cases, a question for the jury whether the parties were acting as the servants of the owner or of the hirer of the carriage. The learned Judge did the same in the present case, and the jury have found that the coachman was the servant of the defendants. But independently of any special circumstances in the present case, the plaintiff contends that the doctrine laid down by *Bayley*, J., and *Hobroyd*, J., in *Laugher v. Pointer*, is the correct one, and that the coachman is in point of law the servant of the hirer.—He cited also *Illidge v. Goodwin* (c), and *Croft v. Alison* (d).

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Channell, Serjt., (*Kelly* with him), in support of the

(a) 1 C. & P. 614.

(b) 1 M. & Hob. 494.

(c) 5 C. & P. 190.

(d) 4 B. & Ald. 590.

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rule.—The special circumstances relied on in this case do not distinguish it from the case of *Laugher v. Pointer*. In the first place, there was no *bargain* for any specific wages to be paid by the defendants to Kemp the coachman, but merely an understanding that he should receive a certain gratuity; and he was paid regular weekly wages by his employer. The same was the state of facts in *Laugher v. Pointer*. Nor was he *selected* by the defendants to drive them, he being the only regular coachman in the yard. When Lord *Tenterden*, in *Laugher v. Pointer*, refers to “length of time” as a circumstance which may indicate the approbation and continuance of the particular coachman, he means to refer to some definite period of employment by the hirer; and all the circumstances specified by him, of time, wages, livery, &c., were meant to be important, as indicating “a *choice* and a *contract*.” But can two parties be concurrently liable? Convenience is against it, as leading to multiplicity of actions. And if one only be liable, convenience also indicates that the action should be against the party who originally hired the driver as a servant. And this is consistent with justice, because he is the most culpable, if the driver is not trustworthy or skilful. *Holroyd, J.*, in *Laugher v. Pointer*, expressed an opinion that one party only could be liable. It is clear that Kemp was in the service of Mortlock for this particular employment and duty. Then is there anything to warrant the inference, that in suffering him to drive them, the defendants not only evinced a *choice*, but entered into a *contract*? [*Parke, B.*—It appears to us that there are no special circumstances which distinguish the present case, and that we must decide the difference between the Judges in *Laugher v. Pointer*. There is no satisfactory evidence of any *selection*, by which this man was made the defendant’s servant; the question is therefore the same as in that case.] All that could be urged on both sides of the question was fully stated in that case,

and it is needless to repeat the arguments to be found there. *Esch. of Pleas, 1840.*

Cur. adv. vult.

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In this Term, the judgment of the Court was delivered by

PARKE, B.—This case was tried before my Brother *Maule*, when he had a seat in this Court. A verdict was given for the plaintiff, and points reserved, which were argued before my Brothers *Alderson* and *Rolfe*, and myself, at the sittings after last Term. The declaration was in case. It stated, that the plaintiff was possessed of a chaise and horse which he was driving; that the defendants were possessed of a chariot, to which two horses were harnessed, which *said carriage and horses were then under the care of the defendants*; and that the defendants so carelessly conducted themselves, that through the carelessness and negligence, want of proper caution, and improper conduct, of the defendants, the horses so harnessed started off with the carriage, without a driver or other person to manage, govern, or direct the same, whereby the defendants' carriage was struck against the plaintiff's carriage, and the plaintiff sustained personal injury.

There were two pleas—first, not guilty; secondly, that the carriage and horses, or either of them, were not under the care of the defendants, or either of them.

On the trial, it appeared that the defendants were two old ladies, who had been in the habit of employing a person of the name of Mortlock, and his daughter, who succeeded him in the business of a job-master, to supply them, originally with a fly and horse and driver, by the day, at a certain sum for the whole; but about three years ago they became possessed of a carriage of their own, since which they had been furnished by Miss Mort-

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lock occasionally with a pair of horses and a driver, by the day or drive, for which she charged and received a certain sum. She paid the driver by the week, and the defendants besides gave him a gratuity for each day's service. For the last three years, the same coachman constantly drove the defendants' carriage, and they had purchased a livery hat and coat for him, which, it appeared, were usually hung up in the passage of the defendants' house, and the coachman, before he drove, was in the habit of going in and putting on the coat and hat, and when he had finished the drive, of returning and replacing them. On the day in question, he wore the hat only, and when he had returned home with the ladies, and after they had got out of the carriage, the coachman went in to replace the hat, and left the horses without any one to hold them, and they set off whilst the coachman was so occupied, and ran against the plaintiff's carriage, overturned it, and inflicted serious personal injury on the plaintiff, besides doing damage to the carriage itself. It appeared that there was no other regular coachman in the job-mistress's yard, but when he was otherwise employed, some other person in the yard acted as coachman, but never for the defendants since they had their own carriage, though occasionally before.

It was objected, that the defendants were not liable, because the damage was caused by the neglect of the coachman, who was not their servant, but the servant of his mistress, Miss Mortlock.

For the plaintiff, it was contended, that they were liable for the coachman's neglect, independently of the special circumstances of the case; and that there were besides two peculiar grounds, on which the defendants ought to be held responsible. First, that there was evidence to go to a jury of selection and choice by the defendants of the particular coachman, so as to make him their servant;

and secondly, that when the coachman went in to leave his hat, he was, in so doing, acting as the servants of the defendants, and therefore his neglect was theirs.

The jury found a verdict for the plaintiff, with 198*l.* 9*s.* damages, and my Brother *Maule* reserved liberty to move to enter a nonsuit.

On the argument, in the course of which the principal authorities were referred to, we intimated our opinion that we should be called upon to decide the point which arose in the case of *Laugher v. Pointer*, and upon which not only the Court of King's Bench, but the twelve Judges differed; as the special circumstances above mentioned did not seem to us to make any difference: and we are still of opinion that they did not. It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my Brother *Maule* thought there was *some* evidence to go to the jury, of the horses being under the defendants' care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the *only* regular coachman of the job-mistress's yard; when he was not at home, the defendants had occasionally been driven by another man, and it did not appear that at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely

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to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is *some* evidence to go to a jury, of any fact, it seems to us, that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference. Nor do we think that there is any distinction in this case, occasioned by the fact that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order in this case, or of any general order to do so, at all times, *without leaving any one at the horses' heads*. If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the meantime.

Besides these two circumstances, the fact of the coachman wearing the defendants' livery with their consent, whereby they were the means of inducing third persons to believe that he was their servant, was mentioned in the course of the argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff that he might sell goods to their livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been

liable on such contract: but this representation can only conclude the defendants with respect to those who have altered their condition on the faith of its being true. In the present case, it is matter of evidence only of the man being their servant, which the fact at once answers.

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We are therefore compelled to decide upon the question left unsettled by the case of *Laugher v. Pointer*, in which the able judgments on both sides have, as is observed by Mr. Justice *Story* in his Book on Agency, page 406, "exhausted the whole learning of the subject, and should on that account attentively be studied." We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord *Tenterden* and Mr. Justice *Littledale*.

The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is.

Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a

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contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice *Eyre* says in the case of *Bush v. Steinman* (a), and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord *Tenterden* observes, "shock the common sense of all men:" not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street. It is true that there are cases—for instance, that of *Bush v. Steinman*, *Sly v. Edgley* (b), and others, and perhaps amongst them may be classed the recent case of *Randleson v. Murray*—in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my Brother *Littledale*, in his very able judgment in *Laugher v. Pointer*.

The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances:

(a) 1 Bos. & P. 404.

(b) 6 Esp. 6.

but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them. It is unnecessary to repeat at length the reasons given by my Brother *Littledale* for this distinction, which appear to us to be quite satisfactory; and the general proposition above referred to, upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion that the defendants were not liable in this case, and the rule must be made absolute to enter a verdict for the defendants on the second issue.

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Rule absolute.

THE ATTORNEY-GENERAL v. DUNN and Another.

THIS was an information against the defendants, as executors of Thomas Boone Tattnall Boone, deceased, for legacy duties. At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Hilary Term, a special ver-

A British subject, domiciled and having real and personal estate in England, went abroad and purchased, in 1828,

the title, castle, and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, and at other times visited Rome, Florence, and other parts of Italy, residing in furnished lodgings. In 1831 he came to England, and resided in different parts of it till September, 1832. In March, 1832, he sent to R. several cases of plate, books, and wearing apparel. In September, 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R.; he then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent towns, till October, 1833, when he went to Rome, and there lived in furnished lodgings until his death in February, 1834:—*Held*, that upon these facts there was no evidence of the testator's having actually acquired a domicile at R., or elsewhere abroad, although they indicated an *intention* to make R. his domicile: that his English domicile therefore remained, and legacy duty was consequently payable on the bequests contained in his will.

Quære, whether if he *had* obtained a domicile abroad, legacy duty would not still have been payable.

Exch. of Pleas, dict was taken by consent for the opinion of this Court,
1840. which stated in substance as follows.

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Thomas Boone Tattnall Boone, the testator in the pleadings mentioned, was born in or about the month of June 1787, at Nassau, New Providence, in the Bahama Islands. John Mubryne Tattnall, the father of the said T. B. T. Boone, was a British-born subject, and, at the time of the birth of the said T. B. T. Boone, resided at Nassau aforesaid, and then held a situation in the service of his then Britannic Majesty King George the Third. The said T. B. T. Boone, during his infancy, visited England for the purpose of his education; and in or about the 8th of July, 1806, was admitted a student at the Inner Temple, with a view of his being called to the English bar; and on the 28th of June, 1816, he was called to the English bar, and upon that occasion took the usual oaths, among which were three oaths in the following form, [setting out the oaths of allegiance, abjuration, and supremacy]. The said T. B. T. Boone practised as a barrister at the English bar from the time of his having been so called as aforesaid until the year 1822, in which year he acquired a large addition to his fortune under the will of Elizabeth Boone, a relation, and thereupon he applied for and obtained a license of his then Majesty King George the Fourth, to assume and use the surname of Boone in addition to his former surname of Tattnall, he having before the granting of such license used and been known by the names of Thomas Boone Tattnall only. [The application and license were then set out]. The said T. B. T. Boone, in pursuance of such license, assumed the surname of Boone, and from thence continued to use the same.

In or about the year 1824, the said T. B. T. Boone, then being in England, purchased a freehold estate containing about eight acres of land, at Lee, in the county of Kent, and some few years afterwards he purchased a few feet of ground to gain a right of way to his land; and under and by virtue of the said purchases and conveyances

thereof respectively, became and was seised in his demesne as of fee of and in the said pieces of land respectively. In the said year 1824 he took a lease for a term of years of a house at Islington, in the county of Middlesex, which he occupied for a few years, but afterwards let the same, and resided in lodgings when in London. At the time of the said T. B. T. Boone so assuming the surname of Boone as aforesaid, he ceased to practise as a barrister at the English bar, and from that period spent the greater part of his time in travelling abroad, occasionally visiting England.

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In or about the month of May, 1828, the said Thomas Boone Tattnall Boone purchased the Marquisate, castle, and estate of Rasina, of about 800 acres, situated in the Papal States, with the exception of about one acre which is situated in Tuscany. The said T. B. T. Boone hired and engaged, and had in his service at the time of his decease, Italian domestics and other servants at the castle of Rasina, in the following capacities;—that is to say, a steward or valet, a factor or bailiff, and man-cook, and a gardener, and two female household servants. He expended large sums of money in repairing the said castle, making and laying out the grounds thereto belonging, and in making roads, and otherwise improving the said estate at Rasina, and such improvements were going on at the time of his death. From the 11th September, 1828, until the month of April, 1831, he kept all the before-mentioned servants at Rasina, except as hereinafter mentioned, although he did not make the castle of Rasina his constant residence during the last-mentioned period; but when in that neighbourhood he sometimes occupied the same, as it suited his convenience, and sometimes took and lived in furnished lodgings in the town adjacent thereto: at other times during the last-mentioned period he visited and remained at Rome, Florence, and other parts of Italy, residing on

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those occasions in furnished lodgings; such visits to Rome, Florence, and the said other parts of Italy having continued for some months respectively. It was the habit of the said T. B. T. Boone, on arriving in any one of the said towns where he so passed some months as aforesaid, after his valet had provided him with the necessary servants, to send the said valet to Rasina, to look after the said works which had been undertaken at the said estate.

In the month of April, 1831, he the said T. B. T. Boone set off from Florence, where he had been previously staying, with his said valet, and arrived at Paris on the 1st of May in the same year, and a few days afterwards left Paris for Jersey and London, in which capital he arrived on the 22nd of June then next. A short time afterwards he went to Cheltenham, to pass the remainder of the summer: in the autumn of the same year he returned to London, and from thence went to Brighton, at which latter place he resided until the month of March, 1832, when he again returned to London, at which last-mentioned place he remained during the months of April and May, and part of June. At the last-mentioned time, he sent from London to the said castle and estate in Italy, a case of plate, and others of books and wearing apparel. He looked over his freehold estate in Kent hereinbefore mentioned, residing in lodgings at Greenwich, from the middle of June, 1832, until the month of August then next, at which last-mentioned time he removed to London, where he remained in furnished lodgings till the time of his departure for the continent, which happened in the first week of September, 1832: he then proceeded from England to Florence, where he remained for the space of about two months, and from thence to the said estate of Rasina. The said Thomas B. T. Boone then lived at Rasina, and in the neighbourhood thereof, sometimes at the castle of Rasina, and sometimes in furnished lodgings in the towns adjacent thereto, until the month of October,

1833. In that month he, taking with him his valet and a man-cook, and leaving his other servants at Rasina, set off from the said estate of Rasina, and went to Rome, where he took furnished lodgings No. 22, via Babbuino. After three weeks' stay at Rome, he sent his valet back to Rasina, in order to attend to the works which were in progress there, and to begin a new road which was to lead to the Tratta of Perugia, but kept the said man-cook with him at Rome. The said Thomas B. T. Boone, after a few days' illness, died in the same lodgings, No. 22, via Babbuino, at Rome, on the 28th of February, 1834.

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The said Thomas Boone Tattnall Boone described himself, when travelling as aforesaid in foreign states, as a native of England, and was so described in the passports which it was necessary for him to obtain from the proper authorities in the different foreign governments and states in which he travelled and lived as aforesaid. The passport used by the said T. B. T. Boone, on his before-mentioned journey from Rome to Florence, was granted to him by the Secretary of State of the Pope of Rome, on the 30th March, 1830, and in such passport the said T. B. T. Boone was called and described in the following words in the Italian language, viz.—“Il Tommaso Tauttall Bioone, Inglese, qui domiciliato, Marchese di Rasina;”—in English, “The Signor Thomas Tattnall Boone, an Englishman residing in this city, the Marquis of Rasina.” At the time of the granting of this passport, there was residing at Rome a British Consul. It was customary for the Papal Government not to grant a passport to a foreigner leaving Rome, if there were in Rome a minister representing the nation to which such foreigner belonged; but there was not any law in Rome which prohibited the Secretary of State of the Pope from granting passports to British subjects leaving Rome, and such Secretary of State had full authority to grant such passports if he thought proper so to do. The passport used

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by the said T. B. T. Boone, on his journey from Florence to Paris, and from thence to St. Malo in France, on his way to Jersey and England, in the months of April and May, 1831, was granted to him by the Pope's nuncio residing in Florence. On the 1st of April, 1831, and at the time when the last-mentioned passport was granted, there was residing in Florence a British minister, and the Florentine authorities were also themselves in the habit of granting passports to the persons requiring the same. In such last-mentioned passport the said T. B. T. Boone was called and described in the following words in the Italian language:—"Il Tommaso Tautall Bioone, Marchese di Rasina, nativo di Inghilterra, domiciliato in Roma." The said Thomas B. T. Boone affixed his signature to the said last-mentioned passport in the following words—"T. Tattnall Boone." And at the foot of the passport there was a note or memorandum in the Italian language, in the words following:—"Relasciato il presente dietro altro passaporto scaduto, & depositato in questa Nunziatura apostolica"—in English, "The present granted on the receipt of the former passport expired, and deposited in this Apostolical Nunciature." The said former passport mentioned in the said note or memorandum, was the passport so granted at Rome to the said T. B. T. Boone in manner aforesaid. It has always been customary for the government of Tuscany not to grant a new passport to a foreigner, if there were in Tuscany a minister representing the nation to which such foreigner belonged, or representing the nation by whose government the passport had been granted, under the protection of which such foreigner had come to Florence; and it has been usual for any such foreigner, in the event of the loss of a passport, or the expiration of its stated term, to address himself to either of such last-mentioned ministers, and to obtain from either of them a new passport; and there was not nor is there any law in Florence, which prohibited the Pope's nuncio

residing in Florence, from granting a passport to a British subject leaving Florence, if he thought proper so to do.

In the police regulations in force at Paris, in the month of May, 1831, a direction is contained in the following words in the French language—"Tout étranger arrivat à Paris avec un passeport délivré par une autorité de la nation à laquelle il appartient, doit être renvoyé devant son ambassadeur, pour faire legaliser la signature de cette autorité, et ce n'est qu'après qu'elle a été ainsi certifiée, que la Prefecture accorde une permission de séjour, ou un visa de départ;" that is to say—"Every foreigner arriving at Paris with a passport granted by an authority of the nation to which he belongs, ought to be sent to his Ambassador, in order that the signature of that authority may be legalised, and it is only after it has been so certified, that the Prefecture grants to the holder a permission to reside, or visa of departure." The "country to which the foreigner belongs" is understood by the police authorities at Paris to be the country of which he is stated in his passport to be a native; and upon a foreigner arriving in Paris, being the holder of a passport upon which had been obtained a "visa," signed either by the Ambassador of the country of which such holder is, or upon the face of the passport is described to be a native, the police authorities of Paris have been accustomed to grant to the holder of the passport their permission to reside, or a visa of departure. The said Thomas B. T. Boone, on the 19th May, 1831, then being in Paris, and about to leave that place on his said journey to St. Malo, Jersey, and England as aforesaid, presented the before-mentioned passport, granted to him in Florence by the Pope's nuncio residing there as aforesaid, to the British Ambassador then residing at Paris, for his signature, and the said Ambassador then signed the same; and the said Thomas B. T. Boone, on the 20th of the said month of May, 1831, presented the said passport to the proper officer of police in Paris for

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signature, and the said officer then signed the same. There was residing in Paris, during the whole of 1831, a nuncio or minister from the Pope of Rome.

The said Thomas B. T. Boone never at any time obtained from his late Majesty King William the Fourth, or from his late Majesty George the Fourth, any license, grant, or other authority to use, assume, or bear the title of Marquis of Rasina, or any other foreign title of honour.

At the time of the death of the said Thomas B. T. Boone, he was considered by the government authorities at Rome to be an English subject, and in accordance with the practice and custom adopted at Rome when English subjects die there, all the property and effects of the said Thomas B. T. Boone, which were then in his lodgings at Rome, were taken possession of by the English Consul at Rome, for the executors of the will of the said Thomas B. T. Boone.

The said Thomas B. T. Boone, whilst he was in England, in August 1832, as aforesaid, disposed of his said leasehold house at Islington, and also at the same time sold his freehold property in the county of Kent. He at that period further caused notice to be given of calling in £2000 which were owing to him, and secured by a mortgage of some freehold and leasehold houses in London and in the county of Essex, but did not succeed in obtaining payment thereof.

Whilst the said T. B. T. Boone was in England, in September 1832, he made his last will and testament in writing, as follows :—

“This is the last will and testament of me, Thomas Boone Tattnall Boone, now residing at 65, Regent Street, London. I give my property in the Papal States, called Rasina, and the plate, china, books, and pictures, to my brother. I give my carriages and harness to my mother. I give £100 a-year to my sister, Mrs. De la Houssaye,

during my mother's life. £500 sterling I give to my faithful servant Angelo Boncinelli, and my gold watch, chain, and seals, and £500 to his wife, Rosina Boncinelli, to be settled on her in Italy. I give the interest accruing from all the rest of my property in possession, remainder, and reversion, to my mother during her life: afterwards one-half of the interest to my brother, and one-half of the interest to my sister: upon the death of my sister, the capital to go to her children, if she have any, and if not, to my brother; upon the death of my brother, the capital to go to his children. I appoint Ralph Brown and Henry Wordsworth, 32, Threadneedle Street, London, (the defendants), my executors, giving them £100 each. Dated the 4th day of September, 1832.

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“T. B. TATTNALL BOONE, (L. S.)

“Signed and sealed in the presence
of CHARLES STOKES, 65, Regent
Street, Piccadilly, London.”

The said Ralph Brown and Henry Wordsworth are strangers in blood to the testator, and British-born subjects, resident in the city of London, and attornies of this Court; and they, on the death of the said T. B. T. Boone, took upon themselves the burden of the execution of the said will, and duly proved the same in the Prerogative Court of the Archbishop of Canterbury, on the 7th day of April, 1834.

[The case then stated, that the testator, at the time of his death, was possessed of the said real estate at Rasina, and of the live stock and effects therein; and that he had then no real estate in this country: it then set forth the particulars of his personal estate; that the executors had assented to the several legacies bequeathed by the will, and retained the amount for the legatees; it then stated the value of the several specific legacies; and that no duty

Exch. of Pleas, had been paid in respect of the said bequests, or any of them; and that the residue of the personal estate in England, after payment of debts and legacies, amounted to £14,000.]

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The question for the opinion of the Court was, whether, under the facts found in the special verdict, legacy duty were payable in respect of the bequests contained in the will of the said T. B. T. Boone.

The *Attorney-General*, for the Crown.—The first question which arises in this case is, whether, upon the facts stated in the special case, the testator had acquired a domicile in the Papal States (*a*). It will not be disputed that he was previously domiciled in England. He resided here for many years, was called to the bar, purchased property in England, and had all the rights belonging to an Englishman and a member of the bar. Nor can the general doctrine be denied, that the original domicile remains until another has been acquired. Then how can it be said that a foreign domicile has been acquired in this case? It could not be by merely travelling abroad, or by purchasing an estate in a foreign state. If the testator had died during the interval when he was in England in 1831 and 1832, at which time he made his will, could it have been said his property would not be subject to legacy duty, and that he must not then have been considered as domiciled in his native country? [*Parke*, B.—He might retain all the rights of a British subject, if he were ever so much domi-

(*a*) The Court suggested, that the question what was the domicile of the testator, was a question of fact, which ought in strictness to have been found by the jury: and it was agreed between the counsel on both sides (although the Attorney-General insisted that it was a

question of law) that the Court should be at liberty, upon the facts stated in the case, to find whether the testator had or had not acquired a domicile in the Papal States, and that such finding should be inserted in the special verdict, and should be final.

ciled in a foreign country, because domicile and national character are quite different things.] Surely not, if it were clear that he had abandoned his country. It was, indeed, even doubted in *Curling v. Thornton* (a), whether an Englishman could acquire a foreign domicile. [Parke, B.—That is altogether overruled by *Stanley v. Bernes* (b).] No doubt; and it will not be disputed that an English subject may acquire a foreign domicile, with reference to a testamentary disposition, so that if he makes a will, it will be determined by the law of the domicile, not by the forum originis, and if he dies intestate, his personal property will be distributed according to the law of the domicile, not according to that of the locus rei sitæ. But there is no pretence for saying, that the testator in the present case had permanently abandoned his country: he had, indeed, purchased the title and estate of Rasina, but it is not because a person has a residence in a foreign country, to which he may go occasionally, that he is domiciled in that country. On all occasions Mr. Boone described himself as a native of England; he applied to the English Ambassador to have his passport visé, not to the Nuncio of the Pope; and finally, he was considered an English subject by the authorities of Rome; his property was taken possession of by them as the property of any English subject would be who was in itinere at Rome; and they could best judge whether he was to be treated as an English subject, or as having become a subject of the Papal States. He resided only occasionally at Rasina; for months together he lived in different towns in Tuscany and elsewhere, not merely at an inn, but in lodgings; and it might just as reasonably be contended, that he was domiciled in Tuscany.

One of the leading authorities on the subject of the law of domicile is that of *Bruce v. Bruce* (c). In that case it

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(a) 2 Addams, 14.

(b) 3 Hagg. 373.

(c) 2 Bos. & P. 229, n.; 6 Bro. P. C. 566.

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was held in the House of Lords, that a Scotchman who entered into the service of the East India Company, and served in India as an officer in their army, was domiciled in the East Indies, the Company being considered in the nature of foreign sovereigns. But the testator in this case accepted no office under the Pope, and did nothing to attach him to any foreign government. In *Somerville v. Somerville (a)*, although Lord Somerville had a house and resided a great part of the year in England, it was held that he was domiciled in Scotland, the domicile of origin never having been lost. In *Curling v. Thornton*, one question was, whether the party had in fact acquired a foreign domicile, and upon that point the judgment of Sir John Nicholl is unimpeached. He says—"The facts relied upon in the allegation by way of defeating the claim of this will to probate, are these: that in 1815 the deceased went to France, and finally withdrew from England in 1816, the following year; that in 1817 he applied for and obtained a royal ordonnance, authorizing him to fix his domicile in that country, and assuring to him, during his residence there, the enjoyment of all civil rights; that he continued resident from that time till his death there in March, 1825, only once in that time coming over to England, merely to transact matters of business (one being the making of the will in question); finally, that he removed nearly all his moveable effects to France, and purchased an estate or estates there in 1817, which estate or estates he actually retained to the time of his death." And the learned Judge upon those facts—stronger than any which exist in the present case—intimated a clear opinion that Colonel Thornton was not to be considered domiciled in France, as not having completely and permanently abandoned his forum originis. In *Stanley v. Bernes*, where the testator was held to have acquired a domicile abroad, the facts

were very strong indeed. There, the deceased was a native of Ireland; he went to Lisbon prior to the year 1770; in 1809 he went to Madeira; and from the time he first left Ireland he was resident in the Portuguese dominions. In 1770 he abjured the Protestant religion; he married a person, who, although of Irish extraction, was a native of Portugal, and a Catholic; his children were all brought up as Catholics, and all the inmates of his house were of that faith: and he had signed the bond of allegiance to Portugal. In 1823, he made a declaration of adherence to the Portuguese Constitution, which was required to be taken by all Portuguese subjects who held offices or received pensions. It is clear, that if it be possible for a British subject to acquire a foreign domicile, it was done in that case: the party went when young to a foreign country; he had no property or residence, no profession or status in his native country; he took the oath of allegiance to a foreign Government; he was there naturalized, married, and had property, and for a long period of years was entirely the subject of that adopted country. In no single particular is a parallel to be drawn between that case and the present. Here the testator did nothing in a foreign country but what a mere traveller might do; he never took upon himself allegiance to any foreign power; he always treated and described himself as an Englishman.

[The *Attorney-General* then proceeded to argue, that even assuming the testator to have acquired a domicile in the Papal States, his personal property in England would be liable to legacy duty: but as the judgment of the Court had no reference to this point, the arguments upon it are omitted. He cited *Attorney-General v. Cockerell* (a), *Attorney-General v. Beatson* (b), *Logan v.*

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(a) 1 Price, 165.

(b) 7 Price, 560.

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Fairlie (a), In re Ewing (b), Attorney-General v. Jackson (c), In re Bruce (d), Jackson v. Forbes (e), Arnold v. Arnold (f).]

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R. V. Richards, for the defendants.—The case plainly divides itself into two parts: the first a question of fact, whether the testator was or was not domiciled in the Papal States; and the second, if that fact be found in favour of the defendants, whether he, being so domiciled, is a party coming within the description intended by the word “person,” in the clause of the 55th Geo. 3, c. 184, Sched. Part 2, imposing the legacy duty.

The first point that presents itself for consideration is, what is the meaning of the word “domicile;” a term introduced in modern times only into the laws of this country. The synonyme given to it in the dictionaries is “house,” or “home.” Wherever a man’s home is, that is his *domicile*: to what country he owes *allegiance*, is altogether a different matter. Nor can the intention of returning to his native country prevent the acquiring of a domicile abroad. Every person who goes to India in the service of the Company, every merchant who goes abroad to conduct his business, goes with the expectation and intention of returning at some period. He is not less a *native* of England, because he resides and is domiciled abroad; and the manner in which he describes himself in passports or otherwise, cannot affect the question of domicile. In *Bruce v. Bruce*, Lord *Thurlow* thus explains the doctrine of domicile:—“A person’s origin, in a question of where is his domicile, is to be reckoned but as one cir-

(a) 12 Sim. & Stu. 284; 1 Myl. & Cr. 59.

(b) 1 C. & J. 151.

(c) 2 C. & J. 101; S. C. on error in Dom. Proc., 8 Bligh, 15;

2 Clark & F. 48.

(d) 2 C. & J. 436.

(e) Ib. 385.

(f) 2 Myl. & Cr. 256.

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cumstance in evidence, which may aid other circumstances: but it is an enormous proposition, that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person's being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise, to rebut that evidence. It may be rebutted, no doubt: a person travelling—on a visit—he may be there some time on account of his health, or business; a soldier may be ordered to Flanders, and be detained at one place there for many months:—the case of ambassadors, &c. But what will make a person's domicile or home, in contradiction to these cases, must occur to every one. A British man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune; but if he dies in the interval, will it be maintained that he had his domicile at home?" Applying the rule there laid down, which was adopted in *Somerville v. Somerville*, the only question is, what is the *home*, or permanent residence, of the party at a particular period? Now, upon the facts found in this case, does it not appear that the deceased was domiciled at Rasina? or, at all events, that he had ceased to be domiciled in England? Here the *original* domicile was in the Bahama Islands; the domicile in England was an acquired one, and the facts shew that he subsequently abandoned that also, and assumed a new domicile abroad. In 1828 his intention was clearly formed to reside permanently at Rasina, and make that his domicile; and in 1832 that intention was completed. The circumstances of his hiring household servants of all kinds, and of his carrying on improvements there for several years, evinced an intention to make it his home: the sending of his plate and books shewed it still more clearly. In the same year, 1832, he disposed of his real property in Kent, and sold his house at Islington; thereby completely breaking up his domicile here. Where had he

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after that time any *home* in England? [Lord *Abinger*, C. B.—You make out a very probable case that he intended to make *Rasina* his permanent residence and domicile; but that is a very different question from whether he had actually done so. We cannot tell, from the case, whether he ever resided a week together at *Rasina*.] The argument is, that he had selected it as his permanent home, having abandoned and broken up his English domicile; although the improvements going on there prevented his constant and regular residence. [*Parke*, B.—Suppose we are of opinion that the testator has acquired no domicile abroad since he had a domicile in England, then you do not dispute that the old domicile remains, and that his property is liable to pay the legacy duty?] No; but it is contended, that assuming him not to be domiciled at *Rasina*, still he had abandoned his domicile in England, and assumed one in the Papal States. [He was then proceeding to the second point, when the Court intimated that it was unnecessary to hear him on that point, as they were against him on the former.]

Lord *ABINGER*, C. B.—We are all agreed that there is not sufficient evidence to establish any domicile after Mr. *Boone* quitted England. We have considered it very much, and with some anxiety. My impression at first was, that there might be; but I now think, that if I were on a jury, I could not find that fact, unless I were prepared to find that an intention is the same thing as an act. I cannot find that the testator is remaining in any one place; and with respect to *Rasina*, the evidence does not enable us to say that he was there for a week at a time, or that his house was furnished; and when he was there, he did not live in the house, but in towns adjacent, and in ready-furnished lodgings. It does not appear, on the facts of this case, that at any one time he was there for more than a short period. He had an *intention*, probably, of making that

his permanent residence, after he had completed certain improvements; but in the meantime he was wandering about in the towns of Italy. There is no more reason for saying he was resident in the Papal States, than that he was resident at Florence: he appears to have been some time in each place, but in ready-furnished lodgings, and in all of them it was as a man passing from place to place. A man may travel about the continent for four or five years, amusing himself at the bathing places, or visiting galleries of works of art; yet however long he may remain, it does not constitute a domicile in any of those places, more especially if he has had a domicile, which he never loses until he has acquired another. I think that in this case there is not sufficient to enable us to determine that in fact Mr. Boone was domiciled either at Rasina, or at any other place abroad; in that case it is admitted that he retained his English domicile: and if he did, it is equally admitted that the legacy duties are payable. I express no opinion upon the question whether they would be payable, if the Court thought that his domicile was abroad, although I entertain an opinion on that subject: but we are all agreed, as the counsel have proposed to put us in the place of a jury, and we are to find as a fact what ought to have been found by the special verdict, that although it is probable, that if the testator had lived, he would have lived at Rasina, and made it his domicile, there is no evidence of anything more than intention, and that we cannot find that he was domiciled either at Rasina, or in any other part of the continent. His English domicile therefore remains.

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PARKE, B.—I am entirely of the same opinion. It seems to me, that, giving full effect to all the evidence, the only conclusion that we can arrive at, is that of an *intention* on the part of the testator to fix his domicile somewhere

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abroad, probably at Rasina. Very likely, if his house at Rasina had been fitted up, and he had gone there to reside for some weeks or months, we might have come to the conclusion that he had fixed his domicile there. But, upon the facts disclosed in the special verdict, I think the Court cannot come to any other conclusion than that it was uncertain: there is no certainty, I think, of anything except of his intention to change his domicile. It is admitted, that his former domicile continued until not only an intended, but until an actual, acquiring of a new one. If it had appeared that the testator's domicile had been in the Papal States, I am by no means prepared to say that I have made up my mind what legacy duty would have been payable: that subject requires a good deal of consideration. There is no small difficulty in reconciling the principles of all the cases which have preceded this.

ALDERSON, B.—Independently of the facts of the case shewing a domicile in England, there is nothing to shew a domicile out of England: all the facts stated at the beginning of the special verdict are consistent with the testator's being an English-born subject. I wish, however, to guard myself particularly against the conclusion, that if the domicile had been in the Papal States, the Crown would not have been entitled to the duties. As at present advised, I think it would.

Judgment for the Crown.

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DEBT on bond, dated 20th of March, 1828, in the penal sum of £200. The declaration set forth the condition, whereby—after reciting that the defendant had been tenant to the plaintiff, and also that he ought to have given up the possession of the lands and grounds belonging to a certain farm, called Stanley House, on the 2nd day of February then last, and of the buildings belonging to the said farm on the 12th day of May then next, according to the terms of his notice; and also reciting, that the plaintiff had consented and agreed to waive the said notice, and to allow the defendant to continue his occupancy of the said farm, with the closes of land and out-buildings and appurtenances thereto belonging, and then occupied therewith by the defendant, for and during the term of one year then next ensuing, to be computed as to the land from the 2nd day of February then last, and as to the buildings from the 12th day of May then next, on condition that the defendant should sign a warrant of attorney in ejectment, to quit the said farm and premises at the expiration of the said year to be computed as aforesaid, which he the defendant had accordingly done, and also on condition that the defendant should execute the said writing obligatory:—it was conditioned, that if the defendant, his heirs, executors, or administrators, did and should put and spread all the manure and compost then collected in the midden-stead, or on any other part of the said farm, on the meadow land to the said farm belonging, immediately after the execution of the said writing obligatory, and did not nor should sell, cart, or convey away any dung, compost, or manure from the said farm, nor plough or sow with corn any part of the said farm, except

Where, at the sale of the stock of the defendant, the tenant of a farm, W., the tenant of an adjoining farm, bought two cows, and, by the defendant's permission, left them on the defendant's farm for some weeks, bringing provender from his own farm to feed them:—*Held*, that the manure made by these cows was manure made on the farm, and that the removal of it by W. was a breach of the condition of a bond, whereby the defendant had stipulated with his landlord that he would "put and spread all the manure and compost then collected in the midden-stead, or on any other part of the farm, on the meadow land, and would not sell, cart, or convey away any dung, compost, or manure from the said farm."

(a) This case was decided in Hilary Term.

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the close called the Stone Bridge Meadow, nor break up or set with potatoes any part of the said farm, except the Blackholes in the close called the Rails Meadow, nor mow any of the pasture land belonging to the said farm, nor take any cattle to agist, nor sell, nor permit to be sold, any of the hay produced on the said farm, before the 25th day of December then next, but did and should in all respects cultivate and manage the said farm in a husband-like manner, and leave all the buildings thereto belonging (main walls and principal timbers excepted) in good repair and condition, to be approved by one J. F. of &c.; and also did and should pay unto the plaintiff the yearly rent or sum of £185 for the said year, to be computed as aforesaid, the whole of the said sum of £185 to become due on the 1st day of May then next; and also did and should, immediately on the execution thereof, pay down all rent and arrears of rent then due to the said plaintiff, the amount of such arrears to be settled by the said J. F.; and also did and should quit and give up the possession of the said farm to the plaintiff in manner following, (that is to say), the land (except the close called the Barnfield) on the 2nd day of February then next, and the buildings and the said close called the Barnfield on the 12th day of May in that present year; and also did and should permit and suffer the plaintiff to plant timber or other trees, and make any road or roads in, over, or upon any part of the said farm, after the 10th day of October then next, without making any compensation for any damage to be occasioned thereby, or being deemed a trespasser in respect thereof; and also did and should well and sufficiently fence off the close adjoining the road on the north side of Woodfold Park Wall, and give up all claim to the pasturage of the uninclosed land on the sides of the said road:—then and in case of the due performance (amongst others) of all and every the aforesaid conditions, that obligation should be void, otherwise should be of

force; as by the said writing obligatory, &c. The declaration then averred, that the plaintiff did allow the defendant to continue the occupation and possession of the said farm and premises, with the appurtenances, in the condition mentioned, for the said spaces of time respectively, and on the terms and conditions, in the said condition of the said writing obligatory mentioned. It then assigned breaches of all the above clauses of the condition:—first, that the defendant, during the continuance of the tenancy, to wit, on the 21st of March, 1838, and on divers other days and times, did sell, cart, and convey away from the said farm and premises, a great quantity, to wit, 200 cart-loads of dung, compost, and manure; secondly, that the defendant broke up and set with potatoes divers, to wit, fifty acres of the land of the farm, being other and different land than the Blackholes in the close called the Rails Meadow; thirdly, that he did not cultivate or manage the farm in a husbandlike manner, but on the contrary thereof, before the proper time and season for so doing, according to the custom of the country, removed from off the farm horses, cattle, and sheep belonging to him, whereby a less quantity of manure was made on the premises than otherwise would have been; fourthly, that he did not fence off the close adjoining the road on the north side of the Woodfold Park Wall, according to the condition; and lastly, that he did not give up all claim to the pasturage of the uninclosed land, but, on the contrary, depastured his cattle on the pasturage of the uninclosed land on the side of the road in the condition mentioned.

The defendant, by his pleas, denied all the breaches assigned, and issues were joined thereon.

At the trial before *Maule, J.*, at the Lancaster Summer Assizes, 1839, the facts relating to the first breach, viz. the removal of manure off the farm, appeared to be as follows. On the 4th of December, 1838, the defendant's stock on the farm was sold by auction. The tenant of

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an adjoining farm, of the name of West, attended, and bought two cows. He asked the defendant's daughter to let them stay on the farm, and he would take hay for them and keep them there. She consented, and they remained accordingly—one a week and the other five weeks. West bought hay daily to feed them, and none of the defendant's was used for that purpose. They stood in a shippon in the farm-yard, and West took away the manure made by them, and spread it on his farm. The learned Judge, in summing up, stated it to be his opinion that this was no breach of the condition, but that it meant that the manure which was not to be conveyed off the farm should be the produce of the farm. [It is not necessary to refer to the facts relating to the other breaches.]—The jury having found for the defendant,

Cresswell, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection: against which, in Hilary Term,

Alexander and *Tomlinson* shewed cause.—Looking at the substantial meaning of this condition, it does not apply to such a case as this. In the first place, the plaintiff has taken upon himself to prove a positive act done *by the defendant himself*, within the terms of the condition: he is bound, therefore, to prove that the removal was the act of the defendant, or of his servant, or of some party directly connected with him: if done without his knowledge, it is not within the prohibition of the bond; and here there was no evidence whatever of such knowledge on his part. Even if a removal of the manure under such circumstances can be within the condition, it ought to have been the subject of a special action against West. [*Alderson*, B.—The difficulty is, that the learned Judge did not leave to the jury the question, whether it was removed *by the defendant*. They have negatived only the fact, that none was removed which was produced on the farm, not that none was removed by the de-

fendant.] But secondly, the learned Judge put the true construction on the bond. The tenant's duty is only this,—to take care that whatever the farm has produced the farm shall have the benefit of. This manure was not made on the farm, nor were the cattle benefited by the farm. Could it be said that the removal of manure made by the droppings of a neighbour's horse, who came on a visit to the tenant, would be a breach of such a condition? In the mode in which the breaches are assigned in the declaration, no entire sentence of the condition is set forth, but it is cut up into minute and separate portions: but in order to put a reasonable construction upon it, it is necessary to refer to the recital and condition generally, to see whether those particular clauses are not explained and controlled by the context. Now the condition is, that the defendant shall put and spread all the manure and compost *then collected in the midden-stead, or on any other part of the farm, on the meadow land, and* shall not sell, cart, or convey away any dung &c. from the farm, nor plough or sow any part of the farm except the Stone Bridge Meadow, nor break up or set with potatoes any part except the Blackholes, &c. &c.: *but* shall in all respects cultivate and manage the farm in a husbandlike manner. The last clause explains all that has gone before: it means that the tenant shall not do any of the acts there specified *contrary to the rules of good husbandry*. Now it would be no violation of the rules of good husbandry, to take away manure brought on the farm for a temporary purpose, and not mixed with the produce of the farm: the tenant is only to leave that which is produced from the farm for the use of the succeeding tenant. There is no such phrase used as "brought upon" the farm: the words "then collected on" the farm, evidently refer to manure the produce of the farm: and the subsequent words ought reasonably to receive the same construction.

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Cresswell, (*W. H. Watson* with him), *contra*.—The argument on the other side assumes that the words, “but shall in all respects cultivate and manage the farm in a husband-like manner”—apply to and qualify all that precedes: but that is not the case. The first clause of the condition applies to manure *then* collected in the midden-stead, or elsewhere on the farm: the subsequent words apply to manure afterwards to be made. How can this argument apply to the prohibition against taking in cattle to agist?—that is not contrary to good husbandry. The last general clause is only cumulative to the previous positive stipulations, applying to anything omitted in them, which is a violation of the rules of good husbandry. Whenever manure is dropped on the farm, which the tenant is therefore entitled to keep there, he has it in right of the farm, and has therefore no power to remove it. Would it have been necessary to aver, in an action for the breach of any of these specific stipulations, that it was contrary to good husbandry? [He was then stopped by the Court.]

LORD ABINGER, C. B.—This certainly appears to be a very ungracious action, unless there is something further in the case than appears to the Court. I am much inclined to agree with the general rule of construction laid down by my brother *Maule*, and differ only in its application to the present case: I think this *was* manure made on the farm; and that independently of any technical question as to the breach of the rules of good husbandry in removing it. The question is not by whose provender the manure was produced, but whether it was made on the farm. Now suppose the farm were near some place where a large fair was held, and it was convenient to the farmer to take in the cattle brought to the fair, for several hours: would he have a right to remove the manure made by these cattle?—would not all their droppings be manure made on the farm? Clearly so. Therefore, without entering upon any

question as to the propriety of the construction adopted by the learned Judge, I think the application of it was wrong, and that this was manure made on the farm, and the produce of the farm. The rule must therefore be absolute.

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ALDERSON, B.—I am of the same opinion.—If, indeed, we were to construe the bond according to its very literal construction, the absurdity would follow, that if a cart-load of manure were brought from a distant farm, and stopped for an hour on this, the tenant could not remove it. But I think it means manure produced on or belonging to the farm. This is produced on the farm, by being first upon the farm in the shape of manure by dropping from the cattle, though they are fed by provisions coming from another farm. It is made on, produced on, and belonging to the farm. There was therefore a substantial breach of the condition, and the plaintiff was entitled to the verdict, on the facts found, and left to the jury. We must adopt a reasonable construction of the instrument, and not put upon it a far-fetched one, even for the purpose of doing what may appear to be equitable in the particular case. I think the words cannot be restrained as Mr. *Tomlinson* contends, but that the proper construction is this: first there is an affirmative covenant; then a number of negative covenants; then a general provision for the observance of the rules of good husbandry: the last is a restriction on the negative covenants alone, and means, that in all other respects not provided for before, the tenant shall conduct himself in a husbandlike manner.

GURNEY, B., concurred.

Rule absolute.

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WELCOME v. UPTON.

To an action of trespass for taking the plaintiff's cattle in an open field called P. & G. Field, and impounding them, the defendant pleaded, first, that T. B., and his ancestors, had been immemorially used and accustomed to have, for themselves and their heirs and assigns, the sole and several pasturage in 217 acres of P. & G. field, in gross, for all his and their cattle, from the 4th Sept. to the 5th April: that T. B. in 1755, by indenture, granted the said pasturage to

TRESPASS for taking and seizing the plaintiff's cattle, horses, and cows, then depasturing in a certain open field, called "Port and Gaulton Field," and impounding the same, &c.

The defendant pleaded, first, that before and at the time of making the indenture thereafter mentioned, Thomas Brereton, and all his ancestors whose heir he then was, from time whereof the memory of man was not to the contrary, had, and every of them had been used and accustomed to have, and of right ought to have had, and the said Thomas Brereton, at the time of making the said indenture, of right ought to have had, for himself and themselves, his and their heirs and assigns, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, two roods, three perches, of and in the said open field, called Port and Gaulton Field, *in gross*, for all manner of his and their cattle to feed and depasture thereon, from the 4th day of September in each and every year, until

B. B., his heirs and assigns for ever: that J. B. (who claimed by descent from S. B.) in 1836 demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing on the said 217 acres. The second plea alleged a right of sole pasturage, in gross, for thirty years before the commencement of the suit, (under the stat. 2 & 3 Will. 4, c. 71, s. 2), in J. B. and his ancestors, and a demise from him to the defendant; concluding as in the first plea. The replication traversed the right of T. B., as alleged in the first plea, and the enjoyment of J. B. as of right without interruption, for thirty years, as alleged in the second.

It appeared in evidence, that within the last twenty years encroachments had been made by buildings and inclosures on the 217 acres, and that above thirty acres had thus been appropriated, but no encroachments had been made on that part of the 217 acres on which the alleged trespass was committed:—*Held*, that these interruptions, being so recent, did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that, not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea.

Held also, 1st, that recitals in a deed-poll of the date of 1800, made by an ancestor of the present owner of the pasturage, and relating to the pasturage, were admissible in evidence to prove the marriages, deaths, &c., of the ancestors of the owner: 2ndly, that leases and agreements made by the ancestors of the present owner, demising the pasturage in question, were evidence to prove the seisin and user of T. B., the grantor, as shewing the enjoyment by parties who claimed under him.

Held, also, that the right of pasturage alleged in the pleas was capable of being granted away, and did not necessarily descend to the heir of the grantor.

Quære, whether such a right of pasturage, in gross, be within the 5th section of the Prescriptive Act, 2 & 3 Will. 4, c. 71.

the 5th day of April next following : that the said Thomas Brereton, on the 19th of April, 1755, by indenture made between him and Samuel Billingsley, granted to the said Samuel Billingsley the said sole and several herbage and pasturage of and in the said 217a. 2r. 3p. in Port and Guilton Field, to have and to hold the said sole and several herbage unto the said Samuel Billingsley, his heirs and assigns for ever. The plea then stated the vesting of the right to the said herbage and pasturage, on the 1st of January, 1826, in J. R. F. Billingsley, and that he demised the same, on the 1st of March, 1836, to the defendant; and justified the seizing and impounding the plaintiff's cattle, on the ground of their being upon and depasturing the land in question.

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The defendant pleaded, secondly, that for thirty years before the commencement of this suit, J. R. F. Billingsley and his ancestors had enjoyed as of right, without interruption, for himself and themselves, his and their heirs and assigns, the sole and several herbage of the said field, in gross, for all manner of his and their cattle to depasture on, from the 4th of September in each year to the 5th of April following. The plea then stated a demise by J. R. F. Billingsley of the herbage in question to the defendant, and a justification of the alleged trespass, in the same terms as in the former plea.

Replication to the first plea, that the cattle of the plaintiff were seized by the defendant in a certain part of the said open field in the declaration mentioned, (setting out the abuttals), and that the defendant, of his own wrong, seized and impounded the said cattle there being; without this, that before and at the time of making the indenture in the first plea mentioned, the said Thomas Brereton and all his ancestors whose heir he then was, from the time whereof the memory of man, &c., had been used and accustomed to have, and of right ought to have had, for himself and themselves, his and their heirs and assigns, the sole and several herbage and

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pasturage of and in the said part of the said open field, and of the said 217a. 2r. 3p. in gross, for all manner of his and their cattle to feed and depasture thereon, from the 4th day of September in each and every year, until the 5th day of April next following, in manner and form, &c. Replication to the second plea, that for and during the full period of thirty years next before the commencement of this suit, the said J. R. F. Billingsley and his ancestors had not enjoyed as of right, without interruption, for himself and themselves, and his and their heirs and assigns, the sole and several herbage and pasturage of and in the said 217a. 2r. 3p. of and in the said open field, in gross, for all manner of his and their cattle to feed and depasture thereon, from &c., in manner and form, &c.

On these replications issues were joined.

At the trial before *Littledale, J.*, at the last Sussex Assizes, the defendant gave in evidence, in support of his pleas, the same conveyance of the right of pasturage, in 1755, from Thomas Brereton to Samuel Billingsley, which was produced on the former trial (a). He then tendered in evidence a deed-poll dated 23rd October, 1800, made by a descendant of Samuel Billingsley, and relating to the right of pasturage in question, in order to prove, by its recitals, the marriages, deaths, and survivorships of the descendants of Samuel Billingsley: and also a lease dated in 1800, and an agreement in 1817, by which certain members of the family of Billingsley had let the pasturage to one James Upton. It was objected for the plaintiff, first, that the recitals in the deed-poll were no evidence against the plaintiff, who was not party or privy to the deed; and, secondly, that the lease and agreement were not admissible, inasmuch as they did not prove any seisin of or user by Thomas Brereton.

(a) See 5 M. & W. 398.

The learned Judge thought all these documents admissible, *Each of Pleas,* and they were accordingly received. 1840.

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It appeared in the course of the evidence that from the year 1818 down to the present time, various encroachments, by buildings and inclosures, had been made upon the 217 acres of land mentioned in the pleadings, and that above thirty acres of it had thus been appropriated by different parties; but no such encroachment had been made on that portion of the open field on which the alleged trespass was committed. It was contended for the plaintiff, that these acts of interruption negatived the right of Brereton to the pasturage of the 217 acres, as claimed by the plea, and shewed that he and those who claimed under him had not enjoyed an uninterrupted user of it. The learned Judge, in summing up, stated his opinion that the interruptions proved were not such as to defeat the right alleged in the second plea; and that as they had taken place only within the last twenty years, they could not affect the right of Brereton, as alleged in the first plea. The jury having found for the defendant,

Platt now moved for a new trial, on the ground that the deed-poll, lease, and agreement were improperly received in evidence, and also on the ground of misdirection as to the effect of the encroachments. He moved also for judgment non obstante veredicto, on the ground that the right of pasturage claimed in the pleas was descendible to heirs, and was incapable by law of being conveyed out of the line of descent.

First, the recitals in the deed-poll were no evidence, as against the plaintiff, who is a stranger to it, for the purpose for which it was put in, viz. to prove the state of the Billingsley family at the time of its execution: Com. Dig., Evidence (B. 5), *Ford v. Grey* (a). [Lord Abinger, C. B.—The recitals are evidence of the state of the family, and of the pedigree, just as a letter written by the party who

(a) 1 Salk. 285.

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made the deed would be. *Alderson, B.*—The inscriptions on tombstones are evidence only as being statements made by the family.]

Secondly, the lease and agreement were no evidence to prove Brereton's right to the pasturage. [*Parke, B.*—They tended to prove that he had enjoyed the right immemorially, by shewing that persons had enjoyed it from him, and from others claiming under him.]

Thirdly, the learned Judge misdirected the jury as to the effect of the interruptions proved. The first plea, which alleged an exclusive right in Brereton to the sole and several herbage, was negatived by proof of repeated interruptions by encroachments. [*Parke, B.*—The interruptions proved began in modern times, and therefore were no evidence to disprove Brereton's title, which was prior to them, and with which they were not connected. *Alderson, B.*—If Brereton had the right in question in the year 1755, the jury were properly directed that modern interruptions would not defeat it.] At all events, they were evidence for the jury that J. R. F. Billingsley had not enjoyed an uninterrupted user. [*Parke, B.*—Being made on that part which is not claimed by the defendant, they were at all events very slight evidence only, if any, of the want of right on the part of the defendant. The issue on the second plea does not bind the defendant to shew a right to the pasturage of the entire open field of 217 acres, but only of that part of it where the cattle were taken. *Alderson, B.*—If the argument for the plaintiff be well founded, as soon as the party lost a small corner of the field by encroachment, he lost the whole. Would the claim of a party to a right of way be defeated by shewing that some person had narrowed it by a few inches?]

Fourthly, the right claimed in the second plea, which is a right to take the whole pasturage *in gross*, is not within the stat. 2 & 3 Will. 4, c. 71, s. 5, which relates only to

rights appendant and appurtenant. Its words are—"It shall be sufficient to allege the enjoyment thereof as of right by the *occupiers* of the tenement *in respect whereof* the same is claimed," &c.

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Lastly, the first plea is bad in substance, and the plaintiff is entitled to judgment non obstante veredicto. The right claimed in the plea is not a right of ownership in the soil; it is a prescriptive right, lying in grant, and was not capable of assignment by Thomas Brereton, but ought to have descended to his heirs. In 2 Bla. Comm. 266, it is said—"If a man prescribes for a right of way in himself and his ancestors, it will descend only in the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent." Nor is the argument inapplicable, by reason of this right being alleged in the plea to be in Thomas Brereton and his assigns, for "assigns" has here the same meaning as "heirs:" Co. Litt. 384. b. [Lord Abinger, C. B.—This is not a right of common, but a right of taking all the herbage. Parke, B.—Have you any authority that such an estate as this cannot be conveyed?] There is no authority to be found, except that which is derived from the analogy between this right and a right of common. *Weekly v. Wildman* (a) is an authority to shew that a right of common sans nombre is not assignable.

LORD ABINGER, C. B.—I am of opinion that the plaintiff is not entitled to judgment non obstante veredicto. I think that the interest of Thomas Brereton in the sole and several pasturage was capable of transfer. Instances of sole pasturage are to be found in the South Downs in Sussex, and they are frequently transferred in gross: it is the same with the cattlegates in the north of England, although some have thought the owners of them are tenants

(a) 1 Ld. Raym. 407.

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in common of the soil. Here there is proved to exist a sole and separate right of pasturage, which may be assigned as a valuable interest. It must be exercised according to the ordinary rules of property, no authority being shewn for its being exempted from them. The plea of prescription was proved: the immemorial right of pasturage was shewn to have been in Thomas Brereton, and was assigned by him to Billingsley, through whom the defendant claimed it. As to the interruptions to the enjoyment, they were of modern date, and could not affect the right of Brereton.

PARKE, B.—It appears to me that there has been no miscarriage at the trial, with respect to the evidence. The question upon the first issue is, whether Thomas Brereton and his ancestors were entitled, in the year 1755, to the sole and separate herbage of the field in question. It was evidence to prove that issue, that parties claiming under him had exercised acts of ownership with respect to it. It was certainly evidence of a seisin in fee in Thomas Brereton, that parties afterwards coming in under him enjoyed the right in the same manner in which he claimed to enjoy it. The next objection is, that the deed-poll ought not to have been admitted in evidence. The only object of its production was to prove relationship: it came from the proper repository, and was rightly received for the purpose of connecting the parties named in it with the present claimant of the right. As to the interruptions, the learned Judge was correct in saying that if Thomas Brereton had a right to the sole pasturage in 1755, his right could not be defeated by interruptions which commenced long afterwards. If the only question in this case had been, whether a right of common in gross be within the stat. 2 & 3 Will. 4, c. 71, s. 5, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that

the present case is within the equity of the statute. But if the first plea be good, the determination of that question becomes immaterial. The first plea claims a prescriptive right in Thomas Brereton and his ancestors, and in his and their heirs and assigns, of sole and several pasturage in the close in question. That plea is good. It is laid down in Co. Litt. 122., that a party may prescribe to take the sole and several herbage; and although this was doubted in *North v. Cox* (a), it was afterwards established as law by the cases of *Hoskins v. Robins* (b), and *Potter v. North* (c). The word "assigns," in the plea, may be rejected as insensible. Then the remaining question is, whether a party who has such a right as this may grant it away from his heirs. I think there can be no doubt that he is not bound to use it by himself and his descendants only, and that the parties are equally entitled to it, whether they claim under him by deed or by descent.

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ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

(a) 1 Lev. 253.

(b) Pollexf. 13.

(c) 1 Ventr. 385.

SHANLEY v. COLWELL.

PETERSDORFF had obtained a rule calling upon the plaintiff to shew cause why the cognovit given by the defendant to the plaintiff, and the judgment thereon, should not be set aside, on the ground that it was obtained from the defendant while he was in custody in execution for the same debt and costs for which the cognovit was given. It did not appear from the affidavits on either side, whether

A cognovit given by a defendant who is in custody in execution on a judgment, for the debt and costs in that action, in consideration of his discharge, is valid, if a writ have been sued

out to support it: and it lies upon the party impeaching its validity to shew that no writ has been sued out.

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the cognovit was founded on any writ sued out or not. The defendant was discharged from custody on giving the cognovit.

Kelly shewed cause.—This cognovit is good. It is, indeed, given for the same debt and costs for which the defendant had already been taken in execution, but it is not given in the same action, and it is founded upon a good consideration, viz. the discharge of the defendant out of custody. No doubt the debt is extinguished by the execution; and if the debtor were out of custody, a security given for the past debt would be of no force, as being without consideration; but the discharge from custody is a good consideration for a new security. At all events, it lies on the defendant, who seeks to set aside a judgment good on the face of it, to impeach it by his affidavits; and here he does not state that no writ was issued on which to found the cognovit: the Court will therefore presume that a writ was issued, the contrary not being shewn.

Petersdorff, contrà.—The defendant's affidavit states, that the cognovit was given "for and in respect of the same debt for which he was then in execution"—which was then satisfied, so far as related to the action in which the judgment was obtained; and it is not suggested that there has been any proceeding on which the second judgment, which has been signed for the same debt and costs, could be founded. It lay on the plaintiff to shew affirmatively that a writ had been issued; it was not a fact in the defendant's knowledge; all he could do was to depose that the cognovit was given for the same debt. To require more, would impose on him the necessity of searching through all the Courts for an indefinite period. All that it was incumbent on him to do, to shew a *prima facie* case of irregularity, he has done.

LORD ABINGER, C. B.—I think this rule must be discharged, on the ground suggested by Mr. *Kelly*, that the defendant has failed to make out that no writ has been issued, on which to found the cognovit. A discharge from prison may, I think, be a good consideration for giving a new security for the debt for which the party is in execution. It is true, a party who has been taken in execution under a ca. sa., and discharged out of prison, cannot make a valid agreement to return into custody; but that rule stands on technical reasons. The judgment is *functum officio* by the execution, and cannot be made the foundation of subsequent proceedings. But a new security given to procure the discharge of the debtor may be valid, and on this ground there can be no objection to a cognovit given for such a purpose. There must, indeed, be a new writ sued out to support the cognovit; but the party who seeks to set aside such an instrument must shew clearly and distinctly, that there has been no process to warrant it. Here the defendant does not shew, as he might have done, that no writ has been issued.

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PARKE, B.—There is no objection to this cognovit, if there is a writ to support it. But the only defect that can be urged against it being the want of a writ, the party who objects on that ground ought to shew that there was in fact no writ. If a writ had actually issued, the cognovit would stand on the same ground as a warrant of attorney, being a new security given in a nominally different action, and so valid in point of law. If a defendant who has been once in execution, and discharged, is again taken in execution for the same debt, he would be entitled to his discharge, on the ground that the debt was satisfied by the former execution; so also, if an action be brought, the discharge from the execution would still be an answer. But if he gives a cognovit, which has reference to a writ

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actually sued out, even for the same cause of action for which he is in execution, he precludes himself from the objections he might have taken in pleading to that action, and the instrument is a good and valid security. Here the only objection is the want of a writ, and that is not distinctly shewn by the defendant.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged without costs.

PIKE v. DAVIS.

Where a Judge at Chambers, upon the hearing of a summons on affidavit, dismisses the summons upon the merits, the party may renew his application to the Court, on additional affidavits.

THIS was a rule calling upon the plaintiff to shew cause why the execution issued against the defendant should not be set aside, with costs, on the ground that the defendant was not indebted to the plaintiff. A summons to the same effect had been taken out at chambers, and heard on affidavits before Gurney, B., who dismissed it on the merits, with costs.

Petersdorff, on shewing cause against the rule, objected that, the matter having been fully heard and decided on by the learned Judge, who it was not suggested had fallen into any error in point of law, the defendant had no right, having failed in that application, to amend his affidavits, and come to the Court to have the case reheard on the merits. If such a course were allowed, parties would make a practice of going before a Judge at Chambers, in order to ascertain the nature of their adversary's case, and then produce additional affidavits to answer it.

Lord ABINGER, C. B.—A party clearly has a right to

to set aside a Judge's order if made; and if he
 o make one, what other remedy is there except an
 on to the Court? Nor is there any rule which
 a party shall not have the power of laying addi-
 before the Courts by affidavit.

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was ultimately referred to the Master.

GILLARD v. BATES.

DEBT for work and labour, money paid, and on an ac-
 count stated. Plea, *nunquam indebitatus*. At the trial
 before *Rolfe, B.*, at the last Devon Assizes, it appeared
 that the action was brought by the plaintiff, an attorney,
 against the defendant, the manager of the West of England
 District Bank, to recover the charges of entering up judg-
 ment upon a warrant of attorney, which one Clarke had
 given to one Bendle, and which Bendle, being a debtor to
 the bank, had deposited as a security for his debt in the
 hands of the defendant. The defence was, that the plaintiff
 was employed by Bendle, and not by the defendant: to prove
 which the defendant called one Bendridge, an attorney, the
 plaintiff's agent, who had been employed by the plaintiff to
 sue out process against Clarke in respect of the warrant of
 attorney; and he having stated that the plaintiff called
 on him one morning in company with Bendle, it was then
 proposed to ask him, whether the plaintiff had not said at
 that interview, that he had been employed by Bendle to
 sue out execution against Clarke. The plaintiff's counsel
 objected to this question, on the ground that, the witness
 being the plaintiff's agent, such communication to him
 was privileged. The learned Judge overruled the objec-
 tion; and the witness answering the question in the affirm-
 ative, the jury found for the defendant.

Where an attor-
 ney sued for
 work and la-
 bour, in issuing
 an execution
 against C., and
 the defence was
 that he was em-
 ployed by B.
 and not by the
 defendant:—
Held, that the
 plaintiff's
 agent, an attor-
 ney, might be
 asked whether
 the plaintiff had
 not said, on in-
 troducing B. to
 him, that he
 the plaintiff
 had been em-
 ployed by B. to
 issue execution
 against C.: and
 that this was
 not a privileged
 communication.

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Rowe now moved for a new trial, and contended that the communication in question was privileged, and ought not to have been received in evidence; and cited *Parkins v. Hawkshaw* (a).

PER CURIAM.—This is in no respect a privileged communication. It is something said by the plaintiff to his agent, on introducing an individual who was to be the plaintiff in another action. The privilege does not attach to every thing which the client says to his attorney: the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed; if it is necessary, it becomes privileged.

Rule refused.

(a) 2 Stark. Rep. 239.

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BRASHIER v. JACKSON (a).

ASSUMPSIT.—The declaration (as originally framed) stated, that [heretofore, to wit, on the 24th day of June, A. D., 1838, at the request of the defendant, the plaintiff became and was tenant to the defendant of a certain messuage or tenement and premises, with the appurtenances, upon certain terms contained in] certain articles of agreement in writing [theretofore] made by and between the defendant and the plaintiff, and signed by them respectively, and bearing date the 2nd day of May, in the year [aforesaid, whereby,] after reciting as therein is recited, it was agreed by and between the defendant and the plaintiff in manner following: that is to say, the defendant did thereby, for himself, his heirs and assigns, covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that he the defendant, his heirs or assigns, should and would make a good and sufficient lease by indenture of [the said] premises to the plaintiff, for the

An amendment of the *nisi prius* record, under the 3 & 4 Will. 4, c. 42, s. 23, must be made during the trial and before verdict, and the Judge cannot give the party power to amend on a future day.

Where the original declaration stated that the plaintiff *became and was tenant* to the defendant of a messuage, on terms contained in articles of agreement between them, whereby the defendant agreed to grant the plaintiff a future lease for 21 years, con-

taining certain covenants; and averred that the plaintiff covenanted to accept such lease, and that, in consideration of the premises, &c., the defendant promised the plaintiff that he should hold and enjoy the premises for the term, without any let, hindrance, &c., from the defendant or any person claiming through him; that the plaintiff remained and continued such tenant as aforesaid until &c., and paid a quarter's rent; but that the plaintiff broke his promise in this, that one R. had lawful title to the premises under a previous lease, granted by the defendant and others, and ejected the plaintiff, &c.: to which declaration there were pleas of non assumpsit, and that the defendant did not become tenant modo et formâ:—*Held*, that the amendment of the declaration, by such alterations and insertions as were necessary in order to treat the agreement, not as an actual demise, but merely as an agreement for a future lease, and making the breach to consist, not in the plaintiff's not holding or enjoying without eviction, but in the defendant's having no title to grant a lease, was not within the stat. 3 & 4 Will. 4, c. 42, s. 23, inasmuch as it introduced an entirely new contract and new breach.

By articles of agreement, dated 2nd May, 1838, the defendant agreed with the plaintiff that he would grant him a lease of a messuage, &c., for twenty-one years from Midsummer-day then next, at a rent of £45, payable quarterly, on the usual days of payment in every year during the said term, the first payment to commence on the 29th September then next: to be entered upon immediately by the plaintiff, he having on the day of the date paid £25 to the defendant: and in the lease were to be contained covenants to pay the rent, to repair, &c. &c., and all other usual and reasonable covenants, with a power to either party to determine the lease at the end of seven or fourteen years:—*Held*, that this instrument amounted to an agreement for a lease only, and not to an actual demise; and that the plaintiff was not entitled to recover as for the breach of an implied promise for quiet enjoyment.

(a) This case was decided in Michaelmas Term last, but was unavoidably omitted in its proper place.

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term of twenty-one years, to commence from Midsummer-day then next ensuing; to hold the same at and under the yearly rent of £45, payable quarterly, on the four most usual days of payment in every year *during the said term, the first payment thereof to commence on the 29th day of September then next*: to be entered upon immediately by the plaintiff, he paying upon the day of the date of the said agreement £25 to the defendant: and in the lease, it was thereby also agreed between the parties, there should be contained on the part of the plaintiff, his executors, administrators, and assigns, a covenant for the payment of the said rent, to bear and pay all the rates, taxes, and assessments which should be made in respect of such premises during the said term, &c.; and also to keep in good and substantial repair the said messuage, to deliver up quietly at the end of the term, not to assign or underlet without consent, nor to exercise offensive trades, and all other usual and reasonable covenants on the part of the plaintiff, and the defendant for quiet enjoyment by the plaintiff, his executors, &c., during the said term; with a power to be therein contained for the said parties, or either of them, by notice in writing to be delivered six months previous to the end or expiration of the first seven or fourteen years, to determine the lease: And the plaintiff did thereby for himself, his executors, &c., covenant, promise, and agree to and with the defendant, his heirs and assigns, that he the plaintiff should and would accept such lease as aforesaid, and would execute and deliver unto the defendant, his heirs or assigns, a counterpart thereof, &c. &c.: And thereupon, to wit, on the said 24th day of June in the year aforesaid, *in consideration of the premises*, and that the plaintiff had then promised the defendant to perform and fulfil all things in the said agreement contained on his part to be performed and fulfilled, he the defendant then promised the plaintiff to perform and fulfil all things in the said agreement contained on his the defendant's

part to be performed and fulfilled, and that he [the plaintiff, should and would hold and enjoy the said premises, and every part thereof, with the appurtenances] for [and during] the said term of twenty-one years [without any lawful let, suit, entry, or disturbance whatsoever, of or by the defendant, or any of his heirs or assigns, or of or by any person or persons claiming by, from, through, or under the defendant, or by or through his or their acts, means, or default].—The declaration then averred the payment by the plaintiff to the defendant of the £25, general performance by him of the agreement, and that he had always been ready and willing to accept the lease, and execute a counterpart: and that although he the plaintiff [remained and continued such tenant as aforesaid, from the said 24th day of June in the year aforesaid] until the 22nd day of December in the year aforesaid, and did in due manner pay to the defendant the sum of 11*l.* 5*s.* of the rent aforesaid, for one quarter of a year of the said term, ending on the 29th day of September in the year aforesaid, yet the defendant did not perform or regard his said promise or agreement, but broke the same in this, that [he the plaintiff hath not held or enjoyed the said premises with the appurtenances without any let, &c., of any person or persons claiming by, through, from, or under the defendant, or by or through his or their acts, means, or default], but, on the contrary thereof, one Thomas Robinson, being the assignee of the estate and effects of Robert Podbury, an insolvent debtor, duly adjudged to be discharged from imprisonment, to wit, on the 8th day of May in the year aforesaid &c., which said Thomas Robinson, as such assignee as aforesaid, [at the time of the commencement of the said tenancy], and from thence until and at the time of the eviction, ejectment, and expulsion hereinafter mentioned, had lawful right and title to the possession of the said premises, under and by virtue of a lease to the said Robert Podbury granted long

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before the making of the said agreement, by the defendant and certain other persons, for a term of years which is not yet expired, did [during the said tenancy of the plaintiff and] during the said term of twenty-one years, to wit, on &c., enter into the said premises, and in and upon the possession thereof, and ejected, expelled, and removed the plaintiff, &c. &c.

Pleas, first, non assumpsit; secondly, that the plaintiff did not become nor was he tenant to the defendant of the said messuage or tenement and premises, with the appurtenances, in the declaration mentioned, in manner and form &c.; thirdly, a traverse of the plaintiff's readiness to accept the lease and execute a counterpart; fourthly, a denial that Robinson had lawful right and title to the premises; and lastly, a denial of the eviction of the plaintiff by Robinson: on all which issues were joined.

At the trial before Lord *Abinger*, C. B., at the London Sittings after Hilary Term, 1839, (on the 21st of February), the agreement in question was put in, and appeared to be in the terms stated in the declaration. It was objected for the defendant, that the instrument did not amount to an actual demise, but only to an agreement for a future lease, and therefore that the second plea, denying that the plaintiff was tenant to the defendant, was proved, and that the defendant was entitled to a verdict on that issue. The learned Judge being of that opinion, the plaintiff's counsel applied to his Lordship to direct an amendment of the declaration under the stat. 3 & 4 Will. 4, c. 42, s. 23, by omitting such words as imported an actual tenancy, and inserting words applicable to an agreement for a lease. The defendant's counsel objected that such an amendment could not be made, as it would altogether alter the frame of the issues. The Lord Chief Baron however granted the application, and gave the plaintiff (notwithstanding the objection of the defendant's counsel, that the amendment must be made, if

at all, during the trial and before verdict) until four days before the commencement of the Term to make his election whether he would amend or not. The trial proceeded, and a verdict was found for the plaintiff, damages 211*l.* 4*s.* 4*d.*; "with liberty for the plaintiff to amend, delivering his amendment four days before the Term, and with leave for the defendant to move for a nonsuit, or verdict for the defendant, or otherwise, as he might be advised." And on the 8th of April, the following order for the amendment was drawn up and signed by the Lord Chief Baron, and indorsed on the *postea*, and a copy thereof was delivered to the defendant.

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"According to the statute made in the 3rd and 4th years of the reign of His late Majesty King William IV., I do order that the plaintiff have leave to amend, and that he do amend accordingly the within record, by striking out of the declaration the words beginning 'heretofore' to the word 'in,' both inclusive (a), and then inserting the word 'by;' and striking out the words 'theretofore' and 'aforesaid, whereby,' and inserting the words 'of our Lord 1838;' striking out the words 'the said' and inserting the word 'certain;' and by striking out the words 'plaintiff should have held,' &c., to the word 'appurtenances,' inclusive, and then striking out the words 'and during,' and the words 'without any,' &c., to the word 'default,' inclusive, and inserting the words 'defendant had good right and title to grant the said lease;' and by striking out the words 'remained and continued such tenant as aforesaid from the said 24th day of June in the year aforesaid,' and inserting the words 'confiding in the said agreement, &c., promise, immediately after the making of the said agreement, to wit, on the day of the date thereof, entered into and upon the said premises, and became and was the tenant thereof, and

(a) The parts in which the amendments were made are inclosed within brackets in the original declaration.

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so remained from thence ;' and by striking out the words 'he the plaintiff,' &c., to the word 'default,' inclusive, and inserting the words 'the defendant had not good right or title to grant the said lease ;' and by striking out the words 'at the time of the commencement of the said tenancy,' and inserting the words 'on the said 24th day of June, in the year of our Lord 1838.'

"ABINGER."

In the following Easter Term, *Bompas*, Serjt., moved for a rule to shew cause why the above order should not be rescinded, and why the verdict should not be set aside, and a nonsuit entered. First, the amendment was not within the statute at all; it produces an entire change of the record, and necessarily introduces totally different issues. [*Alderson*, B.—It is a new contract, and a new breach.] Secondly, the amendment must be made before verdict; the jury are to try the amended record. The plaintiff did not elect to amend at the time of the trial, nor could the defendant tell, until the service of the order on the 9th of April, many weeks after the trial, whether he would amend or not; and then he amended the declaration only, leaving the rest of the issue unaltered. [*Alderson*, B.—If the Judge gives a power to amend in futuro, how can it be said that it is made in a matter which, in his judgment, is not material to the merits of the case? That implies that he must exercise a judgment on it at the time.] Thirdly, supposing the amendment not made, the defendant is entitled to a nonsuit, the instrument produced being only an undertaking to grant a future lease, whereas the declaration describes it as an actual demise. The promise alleged, that the plaintiff should hold and enjoy free from let &c. by the plaintiff, or those claiming under him, would not arise out of a mere agreement to grant a lease in futuro; the point arises, therefore, on the plea of non assumpsit.

A rule having been granted,

Erle and Humfrey shewed cause in Trinity Term.—First, the amendment was within the statute. [*Alderson*, B.—How is it an alteration in the terms of the same contract?—it is a wholly different one. Besides, there is another objection, that it was not made at the trial.] It was taken as so made. It is the constant practice to take amendments at *Nisi Prius* as being then made, although in fact made afterwards. [*Alderson*, B.—Surely it must be made at the trial, because the trial is to proceed, and the jury are to pass their opinion upon the amended record. The amendment must be conformable to the case proved, and the issues joined: but this alters all the issues in substance.] Then it is contended that the declaration is good as it originally stood, and that the plaintiff is entitled to retain his verdict upon it. It alleges that the plaintiff became tenant to the defendant on the terms contained in certain articles of agreement, containing certain specific stipulations, which are set forth. If the instrument of the 2nd of May was a lease, the declaration was proved in omnibus; and if it was only an agreement for a lease, it was proved in substance. The criterion whether an instrument amount to a lease or to an agreement only, is thus stated in *Bac. Abr. Leases (K.)*: “Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose.” Here there is an intention sufficiently expressed, that the defendant shall divest himself of the possession, and the plaintiff shall have it for a determinate time, and at a determinate rent. There is also, it is true, an intention expressed that another instrument shall be afterwards executed; but that does not prevent the first from operating

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as a lease in the meantime. The law on this subject was fully gone into in the recent case of *Alderman v. Neate* (a), in which an instrument very similar to the present was held to operate as a present demise. Here, as there, the party was let into possession on terms distinctly ascertained, and might have gone on for the whole term without the execution of a formal lease. [They cited also, in support of this part of the argument, 1 Rol. Abr. 847, *Maldon's case* (b), *Poole v. Bentley* (c), *Pinero v. Judson* (d), *Wright v. Trevezant* (e), *Warman v. Faithfull* (f).] The cases of *Morgan v. Bissell* (g), *Roe v. Ashburner* (h), and *Hayward v. Haswell* (i), which may appear contrary, are distinguishable. In the first the rent was not ascertained, in the second the premises were not, in the last the proposed lessor had no power of granting a lease. In each of them, therefore, there was something further to be done, which prevented the parties from entering upon certain lands for a certain time and at a certain rent, or something to be done before the other party could be clothed with the character of lessor.

But even if this was only an agreement for a lease, the declaration was substantially proved. The plaintiff became tenant to the defendant. On the 2nd of May, he was put into possession by virtue of this contract: and if he was tenant from year to year, it was on the terms of the written agreement. Could he not have been sued for the £45 as rent by the year? or if he had not been paid the rates or taxes, or not repaired?

But, lastly, the second issue is in fact wholly immaterial. It matters not whether the plaintiff was tenant or

(a) 4 M. & W. 704.

(b) Cro. Eliz. 33.

(c) 12 East, 168.

(d) 6 Bing. 205; 3 M. & P. 497.

(e) Moo. & Mal. 232.

(f) 5 B. & Adol. 1042; 3 Nev.

& M. 137.

(g) 3 Taunt. 65.

(h) 5 T. R. 163.

(i) 6 Ad. & Ell. 265; 1 Nev. & P. 411.

not; the only question is, whether the defendant has promised to grant him a lease for twenty-one years, and has broken that promise. [*Maule*, B.—The promise is “in consideration of the premises;” that is, inter alia, of the plaintiff’s having become tenant.] Then the agreement must be as binding on the one party as the other: if the defendant could have enforced the terms of it against the plaintiff, it must be reciprocal. If the production of the agreement would shew that the plaintiff held on the terms of paying 45*l.* a-year, it must also shew a valid contract as against the other party; and therefore the legal effect of it is that there is an implied promise of quiet enjoyment. [*Alderson*, B.—If it be only an agreement to give a lease containing such a covenant, there is no actual promise: a further act is to be done before the promise arises. *Maule*, B.—In stating this promise, you have stated a lease: if you have not proved a lease, you have not proved your declaration.]

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Bompas, Serjt., and *G. T. White*, contra.—The only question which really remains for consideration in this case, and which arises on the first and second issues, is, whether this instrument be an agreement for a lease only, or an actual lease. The authorities go clearly to this extent, that unless there be some words of present demise, the instrument does not amount to a lease. [They then cited and commented on the following cases:—*Maldon’s case*, *Goodtitle v. Way* (a), *Poole v. Bentley*, *Pinero v. Judson*, *Warman v. Faithfull*, *Wright v. Trezevant*, *Alderman v. Neate*, *Hegan v. Johnson* (b), *Doe d. Bromfield v. Smith* (c), *Dunk v. Hunter* (d), *Rawson v. Eicke* (e)]. This is a demise contracted for, not one *executed*. The real effect of

(a) 1 T. R. 735.

(b) 2 Taunt. 148.

(c) 6 East, 530.

(d) 5 B. & Ald. 322.

(e) 7 Ad. & Ell. 451; 2 Nev. & P. 423.

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the transaction is this, that the plaintiff gives £25 for permission to enter immediately, but does not become lessee until the execution of the lease, pursuant to the stipulations of the agreement.

Cur. adv. vult.

In Michaelmas Term, the judgment of the Court was delivered by

Lord ABINGER, C. B.—[After stating the nature of the case, and the circumstances relating to the allowance of the amendment, he proceeded:] The Court are of opinion that I had no power, without the consent of both parties, to give the plaintiff the liberty of making the amendment after the trial, but that I should have postponed the trial for that purpose, according to the provisions in the 23rd section of the act of Parliament. But my Brother *Bompas* has also satisfied us that it was an amendment which ought not to have been allowed, inasmuch as it introduced a new contract, and would require a remodelling of all the pleas on the record. And we are of opinion, that as the declaration originally stood, the plea that the defendant did not become tenant modo et formâ was substantially proved, the articles of agreement amounting only to a contract for a future tenancy. The result is, that a nonsuit must be entered.

Rule absolute accordingly.

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ASSUMPSIT on a bill of exchange for 68*l.* 9*s.* at three months, drawn by one Philip Lazarus upon and accepted by the defendant, and indorsed by the said Philip Lazarus to J. C. Batho, who indorsed the same to the plaintiff.

Pleas—first, that the defendant did not accept the bill; secondly, that the said P. Lazarus drew and indorsed, and he the defendant accepted the said bill, for the accommodation of the said J. C. Batho, and without any valuation or consideration by any one given or received for the said drawing or indorsing, or for the said acceptance or the payment thereof; of all which the plaintiff had notice: and the defendant further says, that the said J. C. Batho then indorsed and delivered the said bill to the plaintiff, and the plaintiff then took and received, and has always held the same, in order and upon the agreement and terms that he the plaintiff should discount the same, and then pay the value and proceeds thereof upon such discounting to the said J. C. Batho, and for no other consideration or value, and upon no other terms whatever. And the defendant further says, that the plaintiff did not discount the said bill, or pay the value or proceeds thereof upon such discounting, or any part thereof, to the said J. C. Batho, or to the said P. Lazarus, or to the defendant, but he the plaintiff holds, and always has held, the said bill without having given any value whatever for the same, and that neither the defendant nor

To an action on a bill of exchange by the indorsee against the acceptor, the defendant pleaded, that the bill was drawn and accepted for the accommodation of B.; that B. indorsed and delivered it to the plaintiff, in order that he the plaintiff should discount it and pay the value to B., but that the plaintiff did not discount it or pay the value to B., or to the drawer, or to the defendant. To this plea the plaintiff replied, *de injuriâ*:—*Held*, that the replication was good, inasmuch as the plea amounted to matter of excuse for the nonpayment of the bill.

The defendant pleaded, also, that after the indorsement and before the commencement of the suit, the plaintiff in-

dorsed and delivered the bill to a person, whose name is to the defendant unknown; and the defendant then became, and still is, liable to pay the amount to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been and is the holder thereof. Replication, that at the time of the commencement of this suit the plaintiff was, and *still is*, the holder of the said bill; without this, that any other person *is* the holder thereof, in manner and form as in that plea is alleged:—*Held*, that this replication was bad, as the traverse was too large, and put in issue the plaintiff's being the holder of the bill, not only at the time of the commencement of the suit, but also at the time of the plea pleaded, which was immaterial.

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the said P. Lazarus nor the said J. C. Batho has ever received any value or consideration whatever for the said bill.—Verification.

The defendant pleaded, thirdly, that, after the said bill was indorsed to the plaintiff, and before the commencement of this suit, to wit, on the 29th of July, 1839, he the plaintiff indorsed the said bill, upon good and sufficient consideration, to a certain person whose name is to the defendant unknown, and the defendant then became and still is liable to pay the amount of the said bill to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been and is the holder thereof; and this the defendant is ready to verify, &c.

To the second plea the plaintiff replied *de injuriâ*; and to the third he replied, that at the time of the commencement of this suit the plaintiff was, and *still is*, the holder of the said bill; without this, that any other person is the holder thereof, in manner and form as in that plea is alleged.

To both these replications the defendant demurred, and assigned the following causes:—To the replication to the 2nd plea; that the said second plea does not admit that the defendant ever made any promise to pay the plaintiff, but amounts to a denial or traverse of any such promise ever having been made, and that the said second plea does not consist of a mere matter of excuse for the non-performance of the promise declared on, but amounts to an avoidance thereof. And that the same plea contains also matter of interest in the defendant in the said bill of exchange; and also that the defendant in his said plea justifies under authority from the plaintiff. To the replication to the last plea, that the special traverse, being the concluding part of the said replication to the last plea, which is the part thereof which professes to take issue on the plea, does not put in issue the allegation contained

therein, that such other person was the holder of the bill at the time of the commencement of the suit, or of the plea being pleaded, but seeks to raise an issue whether any other person was such holder at the date of the said replication. That if the said replication puts in issue the fact, whether any other person than the plaintiff were such holder at the time of such plea being pleaded, the issue thereby raised is immaterial; that if the plaintiff intended to rely on the allegation in the replication, that the said plaintiff was, at the time of the commencement of the suit, and still is, the holder of the said bill of exchange, the plaintiff should not have pleaded the same as inducement to the special traverse, but should have concluded to the country, with the addition of such special traverse. And further, that the plaintiff, in the said replication, hath so replied as to leave the said defendant in doubt as to the part of the said replication on which the plaintiff means to take issue, and that the said traverse is double and immaterial.

Joinder in demurrer.

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Dowdeswell, in support of the demurrers.—First, the replication to the second plea is bad. That is not a plea in confession and avoidance, but it in effect denies that the defendant made any promise to pay the plaintiff the amount of the bill, and it sets up an interest in the defendant in the bill. [*Parke*, B.—Was not this point settled in *Isaac v. Farrar* (a)? It was there held, that where the plea admits the contract and the breach, and only alleges facts by way of excuse, the replication de injuriâ is proper. The defendant admits the indorsement, but says it was without consideration.] The plea states that the indorsement was made for a special purpose only, and as that was not complied with, it passed no property in the bill to the plaintiff. It does not admit the indorse-

(a) 1 M. & W. 65.

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ment and promise stated in the declaration; and the replication de injuriâ is therefore inapplicable; *Whittaker v. Mason* (a). In *Buchanan v. Findlay* (b), Lord Tenterden says, "If goods or bills are deposited for a specific object, and the bailee does not perform the object, he must return them; the property in the bailor is not divested or transferred until the object is performed." [Parke, B.—Is not this exactly the same as the case of *Isaac v. Farrar*? The plea admits the indorsement to the plaintiff, and that, *primâ facie*, transfers the property in the bill. The facts alleged in the plea constitute matter of excuse for the nonpayment of the bill. In *Whittaker v. Mason*, the action was for a breach of contract in not paying for goods by bills with security, and the plea set out a custom of trade that such security was only given when it was demanded before the goods were delivered: that is a totally different case.] At all events, the replication to the third plea is bad; for it does not put in issue the allegation in the plea, that the plaintiff was not the holder of the bill at the time of the commencement of the suit.

The Court then called upon

Knowles to support this replication.—The allegation in the third plea is, that some other person and not the plaintiff was the holder of the bill; this, to render it material, must be taken to mean, at the commencement of the suit; and that is the allegation traversed by the replication. It therefore puts in issue the fact that the plaintiff was the holder of the bill at the time of the commencement of the suit. Besides, it is expressly alleged in the replication that the plaintiff was the holder at the time of the commencement of the suit; and although that is in the introductory part before the traverse, still it may be taken to assist the traverse. In all pleadings, the time referred to is the commencement of the suit, unless the contrary appears. That was the ground of the decision in *Owen v.*

(a) 2 Scott, 567; 2 Bing. N. C. 359.

(b) 9 B. & Cr. 749.

Waters (a). [Parke, B., referred to *Evans v. Prosser* (b), as overruling *Reynolds v. Beerling* (c).] When the plaintiff traverses that any other person *is* the holder, in manner and form, it means at the time the plea points out, which is the commencement of the action.

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Dowdeswell, contra.—If the words “still is” had had the meaning contended for, the plea would have been held good in *Evans v. Prosser*, because then it would have referred to the time of the commencement of the action. In *Dendy v. Powell* (d), a plea of set-off, stating that “before and at the time of the commencement of the action the plaintiff was indebted to the defendant,” was held bad on demurrer, for omitting to add “and *still is* indebted,” which shews that the words “still is” have not the meaning contended for. Here the party may have got the bill back into his own hands subsequently to the plea being pleaded, consistently with what is stated in this replication. The plaintiff, by traversing that any other person *is* the holder thereof, in manner and form, &c., in fact alleges that the plaintiff was the holder at the time of the plea pleaded. *Le Bret v. Papillon* (e). But the fact so averred is immaterial, and the defendant is embarrassed as to the mode of taking issue.

PARKE, B.—The replication would make it necessary for the defendant to shew not only that the plaintiff was not the holder at the commencement of the action, but that he was not so at the time of the plea pleaded. The allegation is, that no other person *is* the holder thereof; such a traverse is too large, because it makes it incumbent on the defendant to shew that another person, and not the plaintiff, was the holder, both at the commencement of the action and at the time of the plea being pleaded. The latter

(a) 2 M. & W. 91.

v. *Montague*, Doug. 112.

(b) 3 T. R. 186.

(d) 3 M. & W. 442.

(c) Cited in the notes to *Sullivan*

(e) 4 East, 502.

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fact is immaterial, and therefore the replication is bad. I think the word "is" refers to the time of the plea pleaded. Both parties may have leave to amend, otherwise there must be judgment for the plaintiff on the replication *de injuriâ*, and for the defendant on the replication to the third plea.

ALDERSON, B.—I am of opinion that the replication to the third plea is bad. The plaintiff has pleaded in such a way as to compel the defendant to prove that which is immaterial.

The rest of the Court concurred.

Leave to amend accordingly.

THE COMPANY OF PROPRIETORS OF THE PARRETT NAVIGATION COMPANY v. JACOB STOWER, ISAAC TROTT, and JAMES MUNCKTON.

Case.—The first count of the declaration alleged, that the

CASE.—The first count of the declaration alleged, that before and at the time of making the distress thereafter

plaintiffs were proprietors of the Parrett Navigation under certain acts of Parliament, which empowered them to receive certain tolls, and in case of refusal or neglect of payment, to seize and distrain the goods in respect of which such tolls ought to have been paid, and the barge laden therewith, or any other goods belonging to the owners of such first-mentioned goods, or to the person from whom such tolls should be due, being on the said navigation or any part thereof, or any premises thereto belonging, and to detain the same until payment of the tolls. It then alleged that a certain sum was due and in arrear to the plaintiffs as and for tolls payable to them under the said acts, for the transit and conveyance of certain goods in a certain barge, then navigated and conducted by the defendants, I. T. and J. M., upon the said navigation; and averred a demand of the tolls from the person so navigating the said barge, who refused to pay the same, a seizure of the barge as a distress, and a rescue by the defendants whilst the plaintiffs' bailiff was about to detain and impound the same:—*Held*, on special demurrer, that the count was bad, inasmuch as it did not shew that the articles distrained were those in respect of which the tolls were due, or the property of the person from whom they were due, and consequently did not shew any authority to distrain them.

The second count stated, that the plaintiffs had seized a certain barge then navigated and conducted by the said I. T. and J. M., and a certain quantity of coals then being in the said barge, the said barge and coals then being on the said navigation, as a distress for certain tolls then in arrear for the conveyance of certain goods upon the said navigation, and had detained and impounded the said barge and coals, with intent to appraise and sell the same, according to the form and effect of the said statutes, whereupon the defendants on &c. *broke the said pound*, and rescued the barge and coals, whereby &c.:—*Held*, that this count was good, because the goods being alleged to have been *impounded*, they were then in the custody of the law, and the defendants had no right to retake them, and in so doing were wrong-doers.

A demurrer commencing, "And the defendant says that *the said declaration* is insufficient in law," and then proceeding to assign separate causes of demurrer to each count of the declaration, is in form a demurrer to the whole declaration; and if any count be good, the plaintiff is entitled to judgment, the demurrer being too large.

mentioned, the plaintiffs were and still are a body corporate, by the name of The Company of Proprietors of the Parrett Navigation, under and by virtue of an act passed in the 7 Will. 4, under and by virtue of which said act, and of a certain act passed in the 2 Vict., the said plaintiffs during all the time aforesaid were entitled to receive certain tolls, rates, and duties, &c.; and by which first-mentioned act it was enacted, that all tolls &c. becoming due to the said Company under and by virtue of that act, should be paid to such persons, at such place or places near to the said navigation and other works, and under such regulations and in such manner, as the said Company should direct; and in case of refusal or neglect of payment, the said Company might, in case such tolls should amount to or exceed £20, sue for the same by action of debt or upon the case, or the said Company or their collectors or agents might, and they were thereby empowered, whether the tolls, rates, or duties exceeded the sum of £20 or not, to seize and distrain the goods, wares, and merchandize in respect of which such tolls &c. ought to have been paid as aforesaid, and the barge, boat, or vessel laden therewith, or any other goods, &c., belonging to the owners of said first-mentioned goods, &c., or to the person from whom such tolls &c. should be due, and any barge &c. belonging to the owner of such first-mentioned barge, or to the person from whom such tolls &c. should be due, and respectively being on the said navigation and other works, or any part thereof respectively, or any wharf, quay, landing-place, or warehouse belonging thereto, and detain the same until the payment of all and singular the tolls &c. which at the time of such seizure and distress made should be due and owing to the said Company. The count then averred, that the sum of 5*l.* 8*s.* 4½*d.* had been and was due and owing and in arrear to the plaintiffs, as and for tolls payable to them the plaintiffs, under the said acts, for the transit and conveyance of certain goods, wares, and merchandize, in a certain barge then navigated and con-

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ducted by certain persons, to wit, the defendants Isaac Trott and James Munckton, upon the said navigation, according to the provisions of the said acts in that behalf, and which said tolls, when they so became due as aforesaid, were payable at a place near to the said navigation, and to a certain person, to wit, one Francis Keehlman, in that behalf duly named and appointed by the plaintiffs under certain regulations of the plaintiffs, according to the provisions of the said act, whereof the said persons so navigating and conducting the said barge then had notice. The declaration then stated, that after the said sum of money became due, and whilst it was in arrear, and before the distress, the said F. Keehlman, being a person appointed by the plaintiffs to receive the tolls, demanded payment of the same from the said person so navigating the said barge, who refused to pay the same. It then alleged a seizure of the barge as a distress, and a rescue by the defendants while the plaintiff's bailiff was about to detain and impound the same, whereby the plaintiffs were greatly delayed in the recovery of the tolls, and deprived of the means of obtaining satisfaction thereof, and of the charges of the said distress, and were likely to lose the same.

The second count stated that the plaintiffs, by their bailiff, had seized a certain barge then navigated and conducted by the said Isaac Trott and James Munckton, and a quantity of coals then being on the said navigation, as a distress for certain tolls, to wit, 5*l.* 8*s.* 4½*d.*, then in arrear and unpaid for and in respect of the conveyance of goods upon the said navigation, and had detained and *impounded* the said last-mentioned barge and coals, upon a certain part of the said navigation, being the most convenient part of the said navigation for that purpose, with intent to appraise and sell them, according to the form and effect of the said statutes in such case made and provided as aforesaid; whereupon the defendants broke and entered the

said *pound*, and rescued the said barge and coals, whereby the plaintiffs had been and were greatly delayed in the recovery of the said last-mentioned tolls so in arrear as aforesaid, and deprived of the means of obtaining satisfaction thereof, and of the charges of the said last-mentioned distress, and were likely to lose the same.

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To this declaration there was a special demurrer, which commenced as follows:—"And the defendants, by &c., say that *the said declaration* is insufficient in law. And for causes of demurrer to the first count thereof, the defendants, according to the form of the statute in such case made and provided, set down and shew to the Court here the following, viz. for that it is not stated or alleged, nor doth it appear in or by the said first count, that the said barge in the said first count mentioned, and so seized as therein mentioned, was the goods &c. in respect of which the said tolls in that count mentioned, or any part thereof, became due or payable, or the barge &c. laden therewith, or any other goods &c. belonging to the owner of such first-mentioned goods, or any part thereof, or to the person from whom such tolls &c., or any part thereof, were due, or any barge &c. belonging to the owner of such first-mentioned barge, or to the person from whom such tolls were due, as by the said first-mentioned act is required, &c. And also, for that the plaintiffs have not in or by their said first count shewn or set forth any good or lawful right or authority to seize or distrain the said barge therein mentioned. And for causes of demurrer to the said last count, the defendants, according to the form of the statute &c., set down and shew to the Court here the following" (setting forth similar causes).

"And for a further cause of demurrer to the whole of the said declaration, the defendants state and shew to the Court here, that the same is not properly intitled as of the Pleas side of this Honourable Court," &c., &c., [an objection which was not insisted upon in the argument].

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The points marked for argument were, "that in neither count is a sufficient right or power of distress shewn within the terms and meaning of the statute 6 & 7 Will. 4, cap. ci. s. 126, upon which the alleged right of distress is founded."

Hurlstone, in support of the demurrer, was stopped by the Court, who called upon

Butt to support the declaration.—The second count is good, and as the demurrer is to the whole declaration, if either count is good, the plaintiff is entitled to judgment. The second count alleges that the barge and coals had been impounded, and having been impounded, they were then in the custody of the law, and the defendants by breaking the pound became wrong-doers, and liable in an action for so doing. The gist of the action alleged in that count is the breach of the pound, and the statement of the seizure of the barge as a distress is mere inducement. In *Co. Litt.* 476, it is said, "If the distress be taken of goods without cause, the owner may recover; but if they be distrained without a cause, and *impounded*, the owner cannot break the pound and take them out, because they are in the custody of the law." This point was considered in *Cotsworth v. Bettison* (a). That was an action for pound breach, and rescuing a mare which had been distrained damage feasant; and it was there argued that the plaintiff had not entitled himself to maintain the action, for he had not shewn any title to the place where he alleged the mare was damage feasant; but the Court said, "The taking of the distress is but an inducement to the action, and the breach of the pound is the gist of the action: it is not necessary to shew the cause of the distress so certainly. And *Rast. Entr.* 444, and all the other precedents in *parco*

(a) 1 *Ld. Raym.* 104; 1 *Salk.* 247.

fracto are in this manner." [Lord *Abinger*, C. B.—Have you a right to call this a pound, which is in your own possession?] Yes; the distinction in such a case is only as to the necessity of feeding the animal. But no point has been made as to the impounding. If this were not an impounding, the defendants might have traversed that allegation, but by the demurrer they have admitted it. It is laid down in the books, that wherever an animal is once put in the pound, the owner cannot touch it.

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Hurlstone, contra.—The plaintiffs have shewn no right whatever to distrain the goods in question; and if so, the case cited does not apply. In that case there was a common law right to distrain; but here there is no such right, the plaintiffs have no power of distress except by virtue of the statute, and their right to distrain is limited to the subject-matters therein mentioned; and therefore the declaration ought to have gone on to shew that the goods impounded were such as they were entitled to seize on a distress. Besides, in the case cited, the question arose upon a motion in arrest of judgment, which is the same as if it had been upon a general demurrer. The plaintiffs on their own declaration shew themselves to be trespassers, since they do not shew they were entitled to take as a distress that which they allege they so took. At all events, the first count is bad; and the defendants are entitled to judgment on the demurrer to that count, for the demurrer is in substance a demurrer to each count; the causes of demurrer being assigned separately to each.

LORD ABINGER, C. B.—I think the second count of the declaration is sufficient. It alleges that the plaintiffs had seized a certain barge and coals as a distress for certain tolls which were then due, and had impounded them. Being so impounded, they were then in the custody of the law, and the defendants had no right to break the pound

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and retake them ; and in so doing were wrong-doers. That count therefore shews a good cause of action. With respect the first count, I think it is bad, inasmuch as it does not shew that the articles distrained were those in respect of which the tolls were due, or that they were the property of the person from whom the tolls were due. It therefore does not shew that the plaintiffs had any authority to distrain them. But as the demurrer is to the whole declaration, it is sufficient to say that one count is good, and the judgment must be for the plaintiffs.

ALDERSON, B.—The demurrer is in form a demurrer to the whole declaration, and as one count is good, it is sufficient to entitle the plaintiffs to judgment.

Judgment for the plaintiffs.

SPILLER v. JOHNSON.

In an action brought in the name of the public officer of a banking co-partnership company, established under 7 Geo. 4, c. 46, it is not necessary to allege in the declaration that the plaintiff is a member of the company, that he is resident in England, or that he has been duly registered as required by the 4th section of that act: it is sufficient to describe the plaintiff as one of the public officers of the company duly appointed.

THE declaration commenced as follows :—"James Robert Spiller, one of the public officers of certain persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, according to the statute in such case made and provided, under the style and firm of the Northamptonshire Banking Company, and which said J. R. Spiller hath been duly nominated and appointed and now is one of the public officers of the said company, according to the force, form, and effect of the said act of Parliament, complains," &c.

Special demurrer, assigning the following causes amongst others: for that it does not appear in or by the said declaration, that the plaintiff was or is a member of the said copartnership, or that he was or is resident in England, or that he was or is registered as such public officer.

Martin, in support of the demurrer.—The declaration ought to have alleged that the plaintiff is a member of the company, that he is resident in England, and that he is registered as the public officer, to entitle him to maintain the action. The question turns on the 4th and 9th sections of 7 Geo. 4, c. 46, the act for regulating banking copartnerships in England. The 9th section provides, that all proceedings commenced on behalf of any such copartnership “shall and lawfully may be commenced or instituted and prosecuted in the name of any one of the public officers, *nominated as aforesaid* for the time being, of such copartnership, as the nominal plaintiff for or on behalf of such copartnership.” The mode of nomination there referred to is contained in the 4th section, which provides that “an account or return shall be made out, wherein shall be set forth the true names, title or firm of such corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners engaged or concerned in such copartnership; and also the names and places of abode of two or more persons being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as hereinafter is provided; and every such account or return shall be delivered to the commissioners of stamps,” &c. The declaration ought to have shewn that these requisites have been complied with.

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Peacock, contra, was stopped by the Court.

LORD ABINGER, C. B.—It is not at all requisite that those facts should be stated in the declaration. If the fact be that the plaintiff is not a member of the company, and

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ALDERSON, B.—In actions by the assignees of a bankrupt, it is not necessary to state in the declaration that they were elected by the creditors.

Judgment for the plaintiff.

PHILLIPS and Others v. HUTH and Others.

ASSUMPSIT for money had and received. Pleas, non-assumpsit, and a set-off for money paid; with a plea of payment into Court. At the trial, before *Gurney, B.*, at the London Sittings after last Michaelmas Term, it appeared that the plaintiffs, owners of a cargo of tobacco, on the arrival of the vessel, placed the bill of lading (indorsed in blank) in the hands of W., as their factor, for sale. W. entered the goods at the Custom-house in his own name, and (before the cargo was weighed, and without the plaintiffs' knowledge) obtained a dock-warrant for it in his own name. W. had previously agreed with the defendants for the advance to him (W.) of £20,000, on the deposit of other dock-warrants as a security. The defendants, thinking that security insufficient, refused to advance more than £12,000; whereupon W. pledged with him the dock-warrant of the plaintiffs' tobacco, as a security for, and obtained thereon, the remaining £8000:—*Held*, that, under these circumstances, it did not sufficiently appear that W. was *intrusted* with this dock-warrant, within the meaning of the Factor's Act, 6 Geo. 4, c. 94, s. 2, and therefore that the plaintiffs were entitled to recover from the defendants the proceeds of the tobacco, which was sold by the defendants on W.'s becoming bankrupt.

In order to make the factor a party *intrusted* with the dock-warrant, within the meaning of the act, it must appear that the owner of the goods *intended* that the factor should be possessed of it at the time of the pledge, or that he should exercise the power, which the possession of the bill of lading gave him, of obtaining the dock-warrants whenever he in his discretion might think fit.

The defendants had advanced to W. a sum of £14,000, on the deposit of American state bonds. W. & C. afterwards entered into partnership, and agreed with the defendants, in consideration of their discounting W. & C.'s acceptances for £14,400, to deposit with them as a security dock-warrants for goods held by them. W. & C. accordingly deposited with the defendants the dock-warrant of another cargo of tobacco belonging to the plaintiffs, which they had taken out in their own names, under similar circumstances with the former. The defendants gave up to W. the American bonds, and paid over to W. & C. the balance, after deducting the debt due to them from W., and the discount:—*Held*, that if, according to the intention of both parties, the £14,400 was to be placed entirely at the disposal of W. & C., to apply it to any purpose of their own as they pleased, and they directed its payment in account to the defendants in satisfaction of W.'s debt, this was an advance of money to W. & C. within the meaning of the 6 Geo. 4, c. 94, s. 2; but if their intention was, that the new advance was only for the purpose of satisfying W.'s former debt, and it would not have been made, except upon the understanding that it should be so applied, and the application of it otherwise would have been a breach of the agreement, then it was not an advance within the statute.

peared that the action was brought to recover the amount of the proceeds of certain tobacco, sold by the defendants under the following circumstances :—

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The plaintiffs were the owners of two cargoes of tobacco, laden on board two vessels, called the *Amelia* and the *Mariposa*, which arrived in the London Docks, the former on the 24th of September, 1836, and the latter on the 11th of October in the same year. On the arrival of the *Amelia*, the plaintiffs placed the bill of lading of her cargo in the hands of Mr. Warwick, an extensive dealer in tobacco, as their factor, for the sale thereof: and on the arrival of the *Mariposa*, they placed the bill of lading of that vessel in the hands of Messrs. Warwick & Clagett, (Warwick having taken Clagett into partnership in the interim), as their factors, for the like purpose. Both the bills of lading were indorsed in blank. The cargoes were entered at the custom-house by Warwick and Warwick & Clagett respectively, in their own names, so that they were enabled to obtain dock-warrants also in their names; and accordingly, on the 30th of September, Warwick obtained a dock-warrant in his name for the cargo of the *Amelia*; and another dock-warrant for the cargo of the *Mariposa* was obtained by Warwick & Clagett on the 7th of November following.

Prior to the arrival of the *Amelia*, Warwick had agreed with the defendants to make a deposit of certain dock warrants of his own as a security for a loan of £20,000; and on the 24th of September, 1836, he wrote to the defendants as follows :—

“ Messrs. F. Huth & Co., “ London, 24th Sept., 1836.

“ Gentlemen,—In consideration of your having agreed to discount my acceptances for 10,156*l.* 3*s.* 3*d.*, due the 15th of January next, and 10,198*l.* 12*s.* 7*d.*, due the 15th of February next, I now hand you the warrants for the

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under-mentioned goods, as security for the due payment of the said acceptances; and in case of nonpayment, you are authorized to sell all or any part of the said goods by public auction or private sale, and after payment of all costs of sale and charges on the goods, to apply the residue in payment of my said acceptances, and interest at the rate of £5 per cent. per annum, and all expenses to be incurred by you in relation thereto. Should there be any surplus, you will pay the same over to me; and, on the contrary, should there be any deficiency, I agree to reimburse you the same immediately.—I am, &c.

“WM. SIDNEY WARWICK.”

“London Dock Warrant, No. 1875, for 526 hhds. tobacco.

“Ditto 1876, for 639. ” ”

The defendants, in pursuance of this agreement, advanced to Warwick the sum of £12,000; but, on examining the parcels of tobacco mentioned at the foot of the letter, they thought the security insufficient, and refused to advance more than that sum. Warwick, in order to induce them to advance the remaining £8000, agreed to pledge with them the dock-warrant of the tobacco by the *Amelia*, and accordingly, immediately on his obtaining it, on the 30th of September, he pledged it with the defendants, and obtained the further advance of £8000.

The dock-warrant of the cargo of the *Mariposa* was pledged with the defendants by Warwick & Clagett, on the 7th of November, 1836, under the following circumstances: it appeared that Warwick had, on the 17th of September, when he was carrying on business on his own account, obtained from the defendants an advance of the sum of £14,000, on a deposit of Louisiana and Virginia state bonds, to be repaid on the 17th of November following. On the 1st of October, the partnership between Warwick & Clagett was formed, to the knowledge of the

plaintiffs. An application was afterwards made by them to the defendants for a loan; and according to an arrangement then made, it was agreed that the defendants should discount Warwick & Clagett's acceptances for £14,400, on a deposit of dock-warrants as a security; the American bonds to be given up. The following written agreement was accordingly entered into:—

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“ London, 7th November, 1836.

“ Messrs. Frederick Huth & Co.

“ Gentlemen,—In consideration of your having agreed to discount our acceptances for £6400, say £6400, due 7th of February, 1837, £8000, say £8000, due 7th of February, 1837, together £14,400, we now hand you warrants for the under-mentioned goods, to be held by you as security for the due payment of the said acceptances; and in case of nonpayment thereof, you are authorized to sell all or any part of the said goods by public or private sale, and after payment of all costs of sale and charges on the goods, to apply the residue in payment of our said acceptances, and interest at the rate of £5 per cent. per annum, and all expenses incurred by you in relation thereto. Should there be any surplus, you will pay the same over to us; and, on the contrary, should there be any deficiency, we engage to reimburse you the same immediately.—We remain, &c.

“ WARWICK & CLAGETT.”

“ London Dock Warrants:—

“ No. 1880, 7th Nov., 1836, 492 hhds. tobacco, ex Mari-
posa, à Virginia.

“ — 1881, 662 ditto, ditto ex John
Marshall, New Orleans.”

The American bonds were accordingly given up to Warwick, interest calculated on the former advance of £14,000

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to the debit of Warwick, and credit given for the £14,400, less discount, and a balance of 122*l.* 3*s.* 10*d.* was paid by the defendants to Warwick & Clagett.

It was proved that the weighing of tobacco does not usually commence until a month or more after its arrival in the docks, in consequence of its being unfit for that purpose, from being in a state of fermentation; and it is afterwards sold according to the weight at the King's Beam. The weighing of the tobacco by the *Amelia* commenced on the 8th of November, and ended on the 20th of December, and of that by the *Mariposa* commenced on the 13th of November, and ended on the 30th of January, 1837. This was not known to the plaintiffs, who frequently applied to Warwick & Clagett for samples and weights, and about the middle of January directed that the warrants, when obtained, should be *in their own names*. On the 8th of February, Warwick & Clagett stopped payment, upon which it became known to the plaintiffs, for the first time, that both the cargoes had been pledged to the defendants in the manner before mentioned.

It appeared from the evidence, that sales of tobacco were effected, sometimes by delivery orders, sometimes by a transfer of the warrants, which latter, however, could not conveniently be done where less than the whole cargo was sold. No precise usage of trade in that respect was however established. The defendants sold both the cargoes, and paid into Court the balance, after deducting the amount of their advances.

It was contended by the plaintiffs' counsel at the trial, that the defendants were not entitled to retain the amount of their advances, under the Factors' Act, 6 Geo. 4, c. 94, s. 2,—first, because the warrant of neither cargo was *intrusted* to the factors, within the meaning of that act; secondly, because no advance was made on the pledge of the warrant of the cargo of the *Amelia*, such as would authorize the defendants in retaining the proceeds of that cargo;

thirdly, with respect to the *Mariposa*, because there was no advance of anything beyond the sum of 122*l.* 3*s.* 10*d.*, on the pledge of the warrant of that cargo. The learned Judge having expressed his opinion, that, to establish a lien under this act, there must be a pledge of some document intrusted to the broker by the owner, not one which he had himself obtained for the purpose of committing a fraud, left the two following questions to the jury: first, whether the plaintiffs had intrusted these warrants, or either of them, to Warwick, or Warwick & Clagett; secondly, whether the defendants made advances upon the warrants of the *Amelia* and the *Mariposa*? The jury found both questions in the affirmative. They also found that the defendants believed that Warwick and Warwick & Clagett were the true owners: and the verdict was thereupon entered for the defendants.

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Cresswell, in Hilary Term last, obtained a rule to shew cause why the verdict should not be set aside and a new trial had, on the ground of misdirection, and of the verdict being against the evidence. Cause was shewn in the Vacation Sittings after that term, by

The Attorney-General and *J. Bayley*, for the defendants.—First, with regard to the cargo of the *Amelia*. The defendants were fully entitled to retain the amount of their advances upon the warrant of that cargo. The question will turn upon the construction to be put upon the 2nd section of the Factors' Act, 6 Geo. 4, c. 94. It is thereby enacted, "that any person or persons *intrusted with and in possession of* any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any

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contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents, or either of them." The question therefore is, was not Warwick *intrusted* by the plaintiffs with the dock-warrant of the cargo of the *Amelia*; or, at all events, was there not evidence to go to the jury that he was so intrusted? It is submitted that he was so intrusted. The plaintiffs, by intrusting him with the bill of lading, gave him authority to land the goods in his own name, and having so landed them, he was enabled to obtain the dock-warrants. By transmitting the bill of lading to the factor, they intrust him also with the dock-warrant, which is the necessary produce of the bill of lading. And where is the difference between the fact of the intrusting being established by such evidence, and by the universal course of trade, or by the express direction of the consignor? It can never be laid down as law, that the factor is not intrusted with the dock-warrant, because that instrument was never in the bodily possession of the consignor. A consignor living abroad never can have the dock-warrants in his possession; and if such were held to be the law, the effect would be to strike out dock-warrants, and every document of that description, except the bill of lading, out of the second section of the statute. If the consignor, by transferring the bill of lading, enables the factor to obtain the dock-warrant, he is intrusted with the dock-warrant by the authority of the consignor, as much as he is with the bill of lading. The question really is, can there have been an "intrusting" without the dock-warrant having been in possession of the owner

of the goods? If there can, then it is a question of fact to be determined by the jury: here it was submitted to them by the learned Judge, and they have found that Warwick *was* intrusted with the dock-warrant. [*Alderson*, B.—You imply an intrusting of the dock-warrant from the fact of the actual intrusting of the bill of lading?] Yes; from an intrusting with that which necessarily gives the other. [*Alderson*, B.—Not necessarily; because, suppose the letter accompanying the bill of lading had said—"take out the dock-warrant in my name," in that case it would be quite clear the consignor did not intend to intrust the factor with the dock-warrant.] That would make no difference here; it would be like the case where a general agent receives special instructions, in which case the persons with whom he deals are not bound thereby. The question is, was there not evidence to go to the jury that the factor was intrusted with the possession of the dock-warrant, when he was intrusted with the document which clearly authorized him to *obtain* the dock-warrant? The case of *Close v. Holmes* (a), which may be referred to on the other side, has no bearing on the present case. There *Alderson*, B., left it to the jury to say whether the defendants knew that the goods did not belong to Hollingworth, the consignee, and whether he had any lien on them; the jury found that they did not, and that he had no lien on them: that finding made an end of the case. His Lordship expressed a clear opinion that the statute gave validity only to pledges by a factor of documents with which the real owners had previously intrusted him, and that it did not extend to the pledge of documents created (as in that instance) by the factor himself. But the documents in that case were merely a delivery order and a warehouseman's acknowledgment, which are materially different in their nature from dock-warrants, and

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do not come within any of the words of the second section. There was in that case no dock-warrant or certificate—nothing to shew that Hollingworth was the owner of the goods; nothing with which he could be said to have been intrusted by his principal. It was said to be a defect in the statute, that it did not authorize a pledge of *the goods*, but only of the *symbol of property* in the goods: the actual pledge, however, in that case, was of the goods themselves, so that it could not come within the protection of the act. Nothing there laid down by the learned Judge can be supposed to refer to a case like the present, where the goods are not pledged, but the dock-warrant which represents them. [*Alderson, B.*—If you look at the argument in that case, it will shew what the case must have been. It was argued “that the act only gave validity to pledges made by the factor of bills of lading, and other documents of that nature, evidencing title, and with which the factor may have been intrusted by his principal. All the documents enumerated in the statute were of that description; but here the Banking Company made the advance on the faith of a mere delivery order in the one case, and of a warehouseman’s acknowledgment in the other.” The marginal note is very incorrect. I have my note of the case. I expressed my opinion on the construction of the statute, thus: “The defendant must shew that Hollingworth was intrusted with the property by the plaintiff: there is no evidence of that in this case.” That is all my note. I directed the jury to find for the plaintiff.] There is nothing in that opinion hostile to the case of the present defendants. [*Parke, B.*—You say the giving of the bills of lading was evidence to go to the jury that the broker intrusted with them was really meant by the owner of the goods to take out the dock-warrants?] Yes; if he thought fit in his discretion to do so. It is not necessary to shew that the consignor *necessarily* supposed that the dock-warrant would be obtained by the factor. [*Parke,*

B.—Must he not *mean* to intrust the factor with the warrants?] Undoubtedly, he must mean to intrust the factor, if he should choose to take out the warrants. It must and does often happen, that the factor sells the goods before they arrive, on the faith of the bill of lading. The consignor leaves that to his discretion. [*Parke, B.*—He means to intrust him *contingently*. If he does not sell the goods, by transferring the bill of lading before they arrive, when they do arrive, you say he means him to pursue the ordinary course, and take out the dock-warrants. We must come to the consideration of what the word “intrust” means.] The act does not apply to a case where there is a *mere possession* of the document, as where the possession of it is obtained by fraud or felony, without the authority of the consignor. It must be *intrusted* by him: but the word “intrust” applies just as much to the bill of lading as it does to the dock-warrant. When the consignor intrusts the factor with the bill of lading, by transmitting it to him as the consignee, then he intrusts him with the dock-warrant, which he enables and authorizes him to obtain by means of that bill of lading; and if so, he is the person “intrusted with and in possession of” the dock-warrants, and is to be deemed and taken to be the true owner of the goods described therein, within the meaning of the act of Parliament.

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The second objection is, that there was no advance of money on the deposit of the dock-warrant of the cargo of the *Amelia*, because that deposit was made after the agreement of the 24th of September had been entered into. It is true that that agreement had been entered into; but the defendants had refused to advance more than £12,000 upon the security therein mentioned, and it was only upon the faith of the deposit of the dock-warrant of the cargo of the *Amelia*, that the further sum of £8000 was advanced. That was, therefore, an advance within the meaning of this act of Parliament. [*Parke, B.*—The defendants

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were bound by their contract to discount the two acceptances mentioned in the agreement, upon the deposit of the two cargoes therein referred to. When they refused to do that, and refused to advance the remaining £8000, it gave Warwick a right of action against them. Is not that a different case from that of a party making an advance upon a new pledge of other property?] Warwick acquiesced in the proposed arrangement, and the defendants advanced him £8000 upon the deposit of the warrants of the *Amelia*. That was, therefore, an advance entirely on the faith of that warrant.

Next, with respect to the pledge of the cargo by the *Mariposa*. That transaction originated on the 17th of September, when Warwick was carrying on business on his own separate account. On that day he negotiated with the defendants for a loan of £14,000, to be repaid on the 17th of November following. The security given for that loan, for which Warwick was solely liable, was the deposit of Virginia and Louisiana state bonds. Then the partnership is formed, and the agreement of the 7th of November is entered into between Warwick & Clagett on the one hand, and the defendants on the other. That agreement was, that the American bonds should be returned to Warwick, and that the defendants should discount the acceptances of Warwick & Clagett for £14,400, to become due on the 7th of February following. It is not in dispute, that it was contemplated that this money should be applied in paying the debt then due from Warwick, in respect of the former loan of the 17th of September. Suppose the money had actually been paid in gold on the 7th of November, and that Warwick & Clagett having the £14,400, minus the discount, (which would reduce it to £14,220), it was their intention, as soon as they got that sum into their possession, to apply it to pay off the separate debt of Warwick; would not that be a transaction within the 2nd section of the act—it being

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conceded, for the sake of the argument, that Warwick & Clagett were intrusted with the dock-warrant of the *Mariposa*? Would there not be an agreement entered into by Warwick & Clagett, "so intrusted and in possession as aforesaid," with the defendants, for the deposit of this document, "as a security for money advanced or given by such person or persons &c., upon the faith of such several documents, or either of them?" What took place in this case amounts to the same thing; when there is payment by an entry in account, it is the same, with regard to its legal effect, as if the manual operation had taken place of paying over the money, and paying it back again. Even then, no doubt, the objection suggested on the other side would arise, that this is not a transaction protected by the 2nd section, because it was in the contemplation of the parties that the money should be applied in repaying the debt due from Warwick *alone* to the defendants. But it is submitted that the application of the money in that way, even if that had been made part of the contract, would not take the case out of the protection of the act:—still there would be an intrusting—still there would be an agreement to make the advance—still there would be an advance on the faith of the dock-warrant, and every single ingredient that the legislature has required for the protection of parties under the 2nd section. [*Parke, B.*—It does not appear what was done with the former debt, as to any entry in the books.] The balance, after extinguishing the old debt, and deducting the discount, was actually paid over, a cheque being given to Warwick & Clagett for 122*l.* 3*s.* 10*d.* [*Parke, B.*—The question is, whether Warwick could have pleaded payment-to an action brought for the 1400*l.*, advanced on the 17th September?] In answer to such an action, he would have given in evidence the agreement of the 7th November; he would have shewn that new bills were accepted for the sum of £14,400, that they were discounted by the defendants, that the defendants

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gave a cheque for 122*l.* 3*s.* 10*d.*, and that the Louisiana and Virginia bonds were returned by the defendants to him. That, if not conclusive, would be ample evidence for the jury to draw the inference that the former debt had been satisfied. The old debt was thus extinguished, and a new debt was created. There is no single circumstance required by the 2nd section to give the lender of the money protection, which has not been here complied with; or, at all events, there was evidence to go to the jury that each and every one was complied with; and they have found that these advances were made upon the faith of the dock-warrant.

It may perhaps be argued, that this is a transaction within the 3rd, and not within the 2nd section of the act. That section enacts, "that in case any person or persons &c. shall accept and take any such goods, wares, or merchandize, in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, &c., before the time of such deposit or pledge; then and in that case such person or persons, &c., so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall acquire no further or other right, title, or interest in, upon, or to the said goods, wares, or merchandize, or any such document as aforesaid, than was possessed or could or might have been enforced by the said person or persons so intrusted as aforesaid, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, &c., so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid." The 2nd section refers to the symbols of

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property; the 3rd to the property itself. To make out that this was a transaction within the 3rd section, the plaintiffs must shew that the dock-warrant of the *Mariposa* was handed over by Warwick & Clagett for the debt before then due from Warwick & Clagett; because Warwick & Clagett are the persons intrusted with that dock-warrant; and it is only where there is a pawn of the instrument for a debt due from *the person or persons* intrusted with it, that the lien of the factor is transferred. But here there was no antecedent debt due from Warwick and Clagett; it was due from Warwick only. [*Parke, B.*—Would it not be good as a pledge for the payment of the two bills, supposing the transaction was that the old debt should be wiped off, and new bills given by Warwick & Clagett for the old debt; and that the goods, or the warrant, should be deposited as a pledge for the due payment of the bills; and would not that fall within the 3rd section, so as to entitle the defendants to all the lien which Warwick & Clagett had? I throw it out for your consideration, whether, taking the facts to be as I have stated, and that there was no advance of money, but that it was only a wiping off of the old debt, and removing the sole liability of Warwick by means of the giving of these bills and the deposit of the dock-warrant, it is not “a debt due and owing from the persons intrusted and in possession as aforesaid,” within the 3rd section. It is an argument which it may be desirable to consider; otherwise, if the case does not fall within the 2nd section, and does not come in that point of view within the 3rd, the defendants would be without security altogether.] The defendants contend that it was a transaction protected by the 2nd section. It was not a deposit by way of security for an old debt; that was extinguished; it was not an advance to Warwick, but to Warwick & Clagett: the consideration for the advance was the deposit of the dock-

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warrant with which Warwick & Clagett were intrusted, the plaintiffs having delivered the bill of lading to them, and given them permission and authority to obtain it. By the common law of England, a factor might sell at any price, however inadequate, but he could not pawn, however advantageous it might be to his principal. That defect was intended to be remedied, and for the general convenience of commerce, the legislature, by this act, intended to provide that a person *bonâ fide* advancing money to a party having the symbols of property intrusted to him, the former not being aware that the latter was not the actual owner, should have the security of the document pledged with him. Here Warwick & Clagett were intrusted with these dock-warrants; they asked for an advance on the security of them, and the money was advanced on the faith of their being deposited as a security. The defendants are therefore entitled to the protection of the statute, and the verdict found for them ought not to be disturbed.

Crompton and Waddington, contra.—The questions which arose at the trial in this case were altogether matter of law, and there was no question of fact properly to be left to the consideration of the jury, at least without a direction to them on the legal effect of the statute; and the jury had no right to construe it for themselves. If that be so, although the statement of the learned Judge to the jury cannot be complained of as containing any misdirection in terms on matter of law, yet the plaintiffs are entitled to a new trial without payment of costs.

First, there was no intrusting of the factors with the dock-warrant of either of these cargoes, within the meaning of the statute. The question is one which turns altogether on the legal construction to be put upon the words of the act, and no supposed consideration of hardship or inconve-

nience can be imported into it. The argument on the other side, as to this point, appears to be mainly rested on the supposition that it is a necessary, or at least an ordinary, part of the course of business, that a factor, immediately on receiving the bill of lading, would proceed to obtain a dock-warrant. But the evidence on the trial led to an entirely different conclusion. Several of the most extensive tobacco-brokers in the trade stated that they had never in their practice known a warrant taken out for the purpose of the sale of tobacco; and other witnesses stated that it was not usual to do so. It is necessary, indeed, for the purpose of *pledging*; but for the purpose of sale it appeared that a delivery order alone is necessary; and that a dock-warrant would even be an impediment, because it must in every case be taken down to the docks for the purpose of indorsement. It is argued, that the intrusting of the factor with the bill of lading, for the purpose of sale, is impliedly and in effect an intrusting of him with the dock-warrant, that being also a document by which the sale is effected. But that argument fails, when it appears that the dock-warrant is not necessary, nor even usual, in order to the effecting of the sale. [Alderson, B.—Does that make it anything more than a matter of fact for the jury? My difficulty is, is not *enabling* the factor to obtain the dock-warrant *some evidence* of intrusting him with it? Parke, B.—There seems to be a great difference between *enabling* and *intrusting*. Intrusting imports a confidence reposed in the mind. The question is, does it satisfactorily appear that the plaintiffs *meant* Warwick and Clagett to take out the dock-warrants?] The evidence shews clearly that they did not; since at a much later period they were not only in ignorance of their having done so, but expressly directed them to take out the warrants in the plaintiffs' own names. But the mere *enabling* is no evidence of an *intrusting*. Suppose I give a man the

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key of my bureau, in order to go and bring out of it particular papers, and he takes out other papers; can it be said that I *intrusted* him with the latter, because by giving him the key I enabled him to obtain them? [*Parke, B.*—The only question is, whether the enabling—the giving the power to do the act—is not some evidence of an intention that it should be done?] Not where there is another mode of effecting the purpose intended. It appears to be straining language very much to say that a party was intrusted with that, which he had indeed the power given him to create, but which he created only for the purpose and by means of fraud, and of the existence of which the principal was ignorant. Here the dock-warrant was obtained, at all events at a time when it was wholly unnecessary for the purposes of the trust, and merely for the purpose of effectuating a fraud upon the plaintiffs. But even if the evidence fell short of that, the onus is upon the defendants to prove that the case is within the statute; they were bound to prove, therefore, that it is the necessary and ordinary course of trade to sell by means of the obtaining of dock-warrants, and that they were in fact obtained in that necessary and ordinary course of trade, and really for the purpose of the sale. The word “intrusting” must be taken according to its fair and natural import, and to imply a particular trust imposed on the factor, with respect to the taking out of the particular document, at the time of the pledge. Admitting that there may be circumstances indicative of the intention of the principal to impose such a trust, without an express authority, even then there was, in the case of the *Amelia*, no evidence to go to the jury from which to infer any such intention. It was not contended at the trial that there was, but it was put broadly, upon the construction of the act of Parliament, that the *enabling* was sufficient, and that the principal had thereby concluded himself. But if that be enough, an *express pro-*

hibition can make no difference, as against the pawnee, who supposes the factor to be the owner. But the pawnee is not the only party for whose protection the statute was framed, but the consignors and consignees also, who are protected only by the word "intrusted."

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But it may be contended, further, that upon the true construction of the statute, it is meant that the principal shall have the opportunity of marking the document with the *notice* to which the proviso in the second section refers:—"Provided such person or persons, &c., shall not have notice by such documents, or either of them, or otherwise that such person or persons so intrusted as aforesaid is or are not the actual and bona fide owner or owners &c., of such goods," &c. And it may be for this reason, that the statute does not authorize, any more than before, a pledge of the goods themselves, but only of the documents which are the symbols of property in them; because the principal cannot give that notice on the face of the goods, so as to prevent the factor from pledging them in his own name, which he can upon the documents. The real owner ought, therefore, to have an opportunity of putting his title upon every document, and of giving notice thereof by it, if he chooses. Here it was impossible that the plaintiffs could have thus protected themselves. [*Alderson, B.*—That construction would go the length of saying, that in the case of a foreign consignor, no document could ever be pledged except the bill of lading.] He might give the factor an express authority, and so waive his legal right.

With regard to the case of *Close v. Holmes (a)*, although there was no direct decision upon the point now in question, it evidently was the subject of discussion, and the learned judge appears to have formed an opinion upon it. The report states, that "his lordship expressed a clear opinion that the statute gave validity only to pledges by a

(a) 2 M. & Rob. 22.

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factor of documents *with which the real owner had previously intrusted him*, and that it did not extend to the pledge of documents *created by the factor himself.*" [*Alderson, B.*—I think the word "previously" goes beyond my meaning.] The latter words are sufficient to support the argument for the present plaintiffs. [*Alderson, B.*—If your argument be correct, that the owner ought to have an opportunity of indorsing his title on the document, that would give effect to the word "previously," although I dare say that was not in my mind at the time.]

Secondly, the contract as to the cargo of the *Amelia* was not such a contract of loan as would fall within this statute: in the first place, because there was a binding agreement between the parties, whereby the defendants were positively bound to advance £20,000 on the freight of other cargoes, not belonging to the plaintiffs, the non-performance of which would give Warwick a right of action. What was afterwards done had relation back to that agreement upon which it was done, and there was no consideration for a new loan on the security of the plaintiffs' cargo. In reality, that advance was under the old contract, and the defendants wrongfully and without consideration extorted these dock-warrants from Warwick, before they would do that which they were bound in law to do by virtue of their prior agreement. In the next place, this was a pledge of the plaintiffs' and of other property together, and it was part of the contract that at a certain price any part of the property might be taken out of the pledge; and thereby the party, whose property is wrongfully pledged, loses the right he would otherwise have had, of having the property that was well pledged first applied to the satisfaction of the debt. It is clear, that where a factor pledges his own and his principal's property, the former must be first applied, at least in equity, and it is apprehended in law also, to the satisfaction of the pledge. [*Parke, B.*—That, I think, was

settled in the case *In re Westzintus* (a).] Such a pledge as this, therefore, was not a fair advance of money, within the meaning of the statute.

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Lastly, as to the case of the *Mariposa*.—That also is a question of law on the construction of the statute, not a question of fact for the jury: namely, whether certain admitted facts amount to an *advance of money*, or of *negotiable securities*, within the meaning of the act. In order to constitute such an advance, there must be actually and bonâ fide a payment from the one party to the other at the time. Here, what moment was there at which the defendants advanced £14,400 to Warwick and Clagett on the faith of the dock-warrants, *and also* advanced £14,000 to Warwick on the faith of the Louisiana bonds? The real effect of the transaction is, that Warwick remained liable for the old debt until the sale of the cargo of the *Mariposa*, and that the plaintiffs' goods have been taken to pay the £14,000 advanced to him on the 17th of September. The object of the factor in all such cases is, to obtain a present advance of money—to be put in funds; but here all that Warwick and Clagett obtain (even upon the argument for the defendants) is a trifling balance in cash, with a liability to pay a new debt of an equal amount with the old one. Suppose A. to have given bills as a security, which were renewed from time to time, and at length he gives a bill together with B.; can it be said that is an advance to A. and B., within the statute? It is said this was in effect payment to Warwick and Clagett; but it was not a payment of the kind contemplated by this act of Parliament—an advance of money, such as to affect the rights of third parties. But at all events, it must be shewn that the effect of it was the discharge of the old debt, of which there is no evidence whatever. [*Alderson*, B.—It was not shewn

(a) 5 B. & Adol. 817; 2 Nev. & M. 644.

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even to have been written off in account.] There was nothing in evidence but the written agreement, and the payment of the £122. In *Ross v. Willis (a)*, a factor, before the passing of the 6 Geo. 4, c. 94, pledged East India warrants with a banker as a security. After the passing of the act, a substitution of new bills for old took place between the factor and the banker, and the latter claimed to hold the warrants as a security for a bill of £10,000 then discounted for the factor, the cash being placed to the factor's account. It was held that this transaction was not protected by the second section of the statute. *Holroyd, J.*, says: "I look upon the transaction as a mere renewal of the former securities:" and Lord *Tenterden* says—"I do not consider what was done with respect to this bill a new agreement."

With regard to the argument as to the third section of the statute, it seems to amount to this: that because the defendants are not in a situation to avail themselves of the minor remedy given by that section, they must of necessity come in under the major remedy of the second. It may be that the third section does not apply to a case where the antecedent debt was not the debt of the same person who afterwards makes the new pledge; but it is a strange inference to say, that because the case is not strong enough to be included in the enactment which gives a more limited remedy, the party is therefore entitled to the more extensive one.

Cur. adv. vult.

In the present Term, the judgment of the Court was delivered by

PARKE, B.—This case stood over for consideration, on account of the great importance of the principal question which was discussed, as well to the parties as to the public;

(a) *Dans. & Lloyd's Merc. Cases*, 19.

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this being the first occasion on which one of the clauses in the Factors' Act, of frequent practical application, has required the exposition of any of the courts in Westminster Hall. My learned Brothers and myself, who heard the argument on shewing cause against a rule for a new trial, were all then satisfied that it was fit that the case should be again submitted to a jury; but we wished to have an opportunity of giving the subject our full consideration, in order that the meaning of the statute might be distinctly defined, and the law as applicable to the question in the cause correctly laid down.

The action was brought to recover the proceeds of two cargoes of tobacco sold by the defendants. The undisputed facts of the case were these. The plaintiffs were the owners of these two cargoes, one by the *Amelia*, and the other by the *Mariposa*; the former of which vessels arrived in the London Docks on the 24th of September, the latter on the 11th of October. Shortly after the arrival of these ships respectively, the plaintiffs placed the bills of lading of the cargo of the *Amelia* in the hands of Mr. Warwick, an extensive tobacco merchant and broker, and that of the *Mariposa* in the hands of Warwick and his then partner Clagett, carrying on the same business, as their factors respectively, for the sale thereof. Both bills of lading were indorsed in blank. The cargoes were entered by Warwick, and Warwick & Clagett, at the Custom-house, in their names, which enabled them to obtain dock-warrants also in their names. On the 30th of September, 1836, Warwick obtained one for the cargo of the *Amelia* in his name; on the 7th of November, Warwick & Clagett obtained another in their names, for that of the *Mariposa*. It was proved that the sampling and weighing does not usually commence until a month or more after the arrival, as the tobacco undergoes some fermentation, and is not fit for weighing until that has sub-

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The weighing of the tobacco by the *Amelia* commenced on the 8th of November, and ended the 20th of December, 1836. That by the *Mariposa*, commenced on the 13th of October 1836, and ended the 30th of January, 1837. This was not known to the plaintiffs, who frequently applied to Warwick & Clagett for samples and weights, and about the middle of January directed that the warrants, when obtained, should be in their own names. On the 8th of February Warwick & Clagett stopped payment.

It then came out that the cargoes of both vessels had been pledged to the defendants by Warwick, and Warwick & Clagett. It is not necessary to advert to either of these transactions in much detail.

The warrants for the cargo of the *Amelia* were pledged by Warwick, under these circumstances. He had on the 17th of September, 1836, agreed to make a deposit of tobacco-warrants of his own, for a loan of £20,000 to be made to him by the defendants. When Warwick applied for the £20,000, the defendants insisted that the warrants were not a sufficient security, and would advance £12,000 only. On the 30th of September, Warwick procured the dock-warrant for the cargo of the *Amelia*, and immediately pledged it with the defendants, and obtained an advance of £8000 on the security of all the warrants. The warrant of the cargo of the *Mariposa* was pledged by Warwick & Clagett on the 7th of November, 1836, under these circumstances. Warwick had already had an advance of £14,000 on the 17th of September, on a deposit of American State Bonds, such advance having been made by discounting Warwick's acceptances. On the 7th of November, an agreement was entered into in writing, for a discount of Warwick & Clagett's acceptances for £14,400, on a deposit by way of security of the warrant of the

Mariposa's cargo, and another of Warwick & Clagett's own. The American bonds were given up, interest calculated on the former advance of £14,000 to the debit of Warwick, and credit given for the £14,400, less discount, and a balance of £122 paid by the defendants to Warwick & Clagett. Evidence was given of the mode in which sales of tobacco were effected. It was sometimes by delivery orders, sometimes by warrant, which was not convenient, when less than the whole cargo was sold. No established usage of trade was proved. The defendants sold both cargoes, and paid into Court the balance after deducting the amount of their advances. Under these circumstances, the plaintiff's counsel insisted that the advances could not be retained under the Factors' Act, because, first, the warrants of neither cargo were *intrusted* to the factors, within the meaning of the act; secondly, because no advance was made on the pledge of the warrant of the cargo of the *Amelia*, such as would authorize the defendants to retain the proceeds of that cargo; thirdly, because there was no advance of any sum beyond the £122, on the transaction relative to the warrant of the *Mariposa*.

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My Brother *Gurney*, expressing his opinion that to give a lien under the act, there must be a pledge of some document intrusted to the broker by the owner, not one which he had himself obtained, in order to commit a fraud, left these questions to the jury as questions of fact:—

1st, Whether the plaintiffs had intrusted these warrants, or either of them, to Warwick, or Warwick & Clagett?

2ndly, Whether the defendant made advances upon the warrants of the *Amelia* and *Mariposa*?

The jury found *both* these questions in the affirmative. They also found that the defendants believed that Warwick, and Warwick & Clagett, were the true owners; and to the propriety of the finding on that point there was no objection.

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A rule nisi was obtained for a new trial, on the ground both of the verdict being against evidence, and for a misdirection, or rather the want of a sufficient direction in point of law.

The principal question is, as to the meaning of the 2nd section of the 6 Geo. 4, c. 94, commonly called the Factors' Act.

Before the passing of this act, or rather the previous Factors' Act, the 4 Geo. 4, c. 83, it was clearly settled, that a factor, or agent for sale, had no power to pledge, whether he was in possession either of the goods themselves or of the symbol of the goods, and even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of lading, in which he was the consignee or indorsee. This was in accordance with the general rule, that he who deals with one acting *ex mandato*, can obtain from him no better title than his mandate enables him to bestow.

But this rule was thought by some to be attended with hardship on merchants and others dealing with factors, on the faith of their being principals; and the legislature, by the 4 Geo. 4, first relaxed this rule, and by the 6 Geo. 4 extended that relaxation. It does not appear to be necessary to advert to the former act, as the case is not within the terms of it, nor does it throw any light on the construction of the latter statute, except that the 1st section shews that the word "intrusted" was not unimportant, and advisedly introduced; for it provides, that the person in whose name goods shall be shipped shall be deemed to be "*intrusted* therewith for the purposes of the act, unless the contrary thereof shall appear or be shewn in evidence by the person disputing the fact." The question turns upon the 2nd section of the 6 Geo. 4; it provides, "that any person *intrusted* with and in possession of any bill of lading, dock-warrant, &c., shall be deemed and taken to be the true owner of the goods de-

scribed and mentioned in those documents, so far as to give validity to any contract or agreement entered into by the person *so intrusted* and in possession, with any other person, for the sale, disposition, deposit, or pledge of such goods, a security for any money, or negotiable instrument, advanced or given by such other person, on the faith of such document, provided he shall not have notice by the document or otherwise that the person *so intrusted* shall not be the true owner."

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It is very clear, that this section relaxes the rule of the common law, only with respect to those who deal with persons who are not merely in possession of, but are also *intrusted* with, the symbol of property. However great the hardship may be on innocent persons, and whatever they may have supposed from finding another in possession of a document bearing the indicia of property in himself, still the statute does not apply, and they can acquire no title by virtue of it, unless the document has been *intrusted* to that person. If the legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided; if they had, the innocent party dealing with him would have been protected, but the innocent owner would, in that case, have suffered, if the document had been taken from him by felony or fraud. But by providing that a person should be *intrusted* as well as in possession, the inconvenience is obviated. The statute applies only to written documents relating to goods, and not to goods themselves; and for this reason,—these documents may be made to designate the owner's name, which the goods themselves, generally speaking, cannot; and it is clear that the legislature intended that those persons only should suffer by the frauds of their agents, who have intrusted them with the evidence of title, and omitted to take those precautions which might have prevented them from deceiving others.

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It is therefore necessary, in order to give effect to this clause, that the owner should have "*intrusted*" the factor with the document; not that it is necessary that the owner should have had personal possession of the document, so as to be able to mark it with his name, and himself delivered it to the factor; for if his own agent, general or special, puts it into the hands of the factor with the factor's name on it, or if the factor be instructed by the owner to obtain the document in that state, and does so, no doubt he is "*intrusted*" by the owner with it, within the meaning of the act. But in order to constitute an *intrusting* of such a document, it is necessary that the owner should have intended the factor to possess it in that form, at the time when he had the possession. *Intrusting* with the document is essentially different from *enabling* a person to become possessed of it—from giving him the means of obtaining it. An instance of the difference was well put in the argument, when it was said by Mr. *Crompton*, that one who gives another the key of his bureau to get out one paper, may enable him to procure any other that he pleases to take, but does not *intrust* him with it. It is not enough, therefore, to shew that the plaintiffs impowered Warwick, or Warwick & Clagett, to possess themselves of the warrants whenever they chose; it must be shewn that the plaintiffs really *intended* that the factors should be possessed of them at the time they pledged them, or it must be shewn that the plaintiffs meant them not merely to have the power which the possession of the bill of lading would give—of getting the warrants when they liked, but *to exercise that power* by obtaining it *whenever they in their discretion might think fit*. If either of these intentions were proved, it would be sufficient; but if the factors were proved to be in possession of the warrants, under such circumstances as that the plaintiffs, if they had been informed of that fact, might justly have said, "*we never meant this,*" it is impossible to say that they in-

trusted the factors with these warrants. The principals can never be deemed to have *intrusted* the agents with a document which the agents obtained in breach of their trust, against the intention of their principals, in violation of their duty towards them, and which document never would have existed at all, if it had not been for the fraud of the agents against their employers. It was well observed by Mr. *Crompton*, that it is impossible to suppose a confidence reposed by the employer with respect to a document, the very existence of which is a fraud upon him.

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It is, no doubt, true that the fact of the delivery of the bills of lading for the purposes of entering the cargoes, which furnished the means of obtaining the warrants, is, as was insisted by the *Attorney-General*, some evidence of the intention of the plaintiffs that the factors should have those warrants at some time, or that the plaintiffs meant them to take them when they pleased; but it is evidence merely; and independently of the objection insisted upon on the part of the plaintiffs, that the construction of the act of Parliament ought to have been more fully explained to the jury, we think that if it had been, the finding of the jury upon that evidence in this case is not satisfactory.

If it had been the established usage of trade to sell by dock-warrants only, and to obtain them at the time these were obtained, doubtless there would be a strong case for the jury; for the plaintiffs might fairly be considered, in the absence of express instructions to the contrary, as having intended that the factors should pursue the ordinary and usual course. There was no such proof of its being the usual course, but the contrary; and we think that no inference of intention can be drawn from the mere fact of the delivery of the bills of lading, as to obtaining the warrants, except that the factors should obtain them, *if those documents* should be reasonably required for the purposes

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and upon the facts in this case, it is clear that these documents were obtained long before there was any occasion for them, and even before the cargoes were weighed and sampled. It may be added, that there was no evidence of a general agency in Warwick, or Warwick & Clagett, or of any general discretion being given to them, to act as they thought fit, with respect to the obtaining warrants. Indeed, it is not pretended that they stood in any other relation than that which ordinary factors for sale bear to ordinary principals, in which case all that the principal intends is, that a sale should be made, and every step taken which is reasonably required for the accomplishment of that purpose and no other.

Upon these grounds, therefore, we are of opinion that there ought to be a new trial.

It will not be improper to add, that if there was an *intrusting* of the warrant of the *Amelia's* cargo, in this case, we think it was properly pledged to the extent of £8000; for, although the defendants might be bound by this contract to advance the remaining £8000, residue of the £20,000, on the security of Warwick's own property, yet they refused to do so; and if instead of suing the defendants on their contract, Warwick chose to pledge fresh property for an immediate advance, such pledge would be good.

As to the alleged advance on the 7th of November, 1836, of £14,400, we think that the true question is, whether, according to the intention of both parties to that transaction, the £14,400 was meant to be placed entirely at the disposition of Warwick & Clagett, so that they might, without any breach of the understanding with the defendants, have applied the amount to any purpose of their own. If they might, and they directed the amount to be paid to the defendants in account, to satisfy the old debt due from Warwick, instead of receiving the money and

handing it back, there would, we think, be an advance. But if the real meaning of the parties was, that the new advance, by discounting the new acceptances of Warwick & Clagett, was only to take up the former acceptances of Warwick, and would not have been made except on the understanding that the amount should be so applied, and it would have been a breach of the agreement to have done otherwise, then we think there would have been no advance within the meaning of the statute.

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The rule must therefore be absolute.

Rule absolute.

END OF EASTER TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, 3 VICTORIÆ.

REGULA GENERALIS.

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IT is resolved by the Judges, that when a Judge's Order is made a Rule of Court, it shall be a part of the Rule of Court, that the costs of making the Order a Rule of Court shall be paid by the party against whom the Order is made: Provided an affidavit be made and filed, that the Order has been served on the party or his attorney, and disobeyed (a).

27th May, 1840.

(a) See the case next reported.

Esch. of Pleas,
1840.

REGINA v. GAMESON.

THIS was a rule calling upon the plaintiff to shew cause why an attachment, issued against the defendant for non-payment of two several sums of 1*l.* 8*s.* 7*d.* and 2*l.* 18*s.* 2*d.*, pursuant to the Master's allocatur, should not be set aside. In Hilary Term, *Crowder* shewed cause against the rule, and *Hoggins* was heard in support of it. The question in the case was, whether the costs of making a Judge's order, for discharging a summons with costs, a rule of Court, were costs within the meaning of the order and rule, so as to bring the defendant into contempt for nonpayment of them. The Court took time to consult the Judges of the other Courts, and in this term judgment was delivered by

Upon a Judge's order, discharging a summons with costs, the costs were taxed and demanded, and not being paid or tendered, the order was made a rule of Court. The costs of making it a rule of Court were also taxed, and both sums were separately demanded. The party tendered the former amount, but refused payment of the latter:—*Held*, that he was not liable to an attachment, the costs of making the order a rule of Court not being costs within the meaning of the order and rule.

PARKE, B.—On the 5th of February, 1839, I made an order, dismissing with costs a summons to amend the declaration, by inserting the defendant's true name at the plaintiff's cost. The costs of this order were taxed at 1*l.* 7*s.*, and an allocatur given for that amount. Whether this order was served appears doubtful on the affidavits, but the defendant's agent attended the taxation of costs thereon. On the 14th of February, my Brother *Alderson* ordered all proceedings in the action to be stayed, on payment of debt without costs, on the ground that it was under £5, and recoverable in a Court of Requests.

The plaintiff afterwards applied (after giving notice to the defendant) to my Brother *Alderson* to amend his order, by saving to the plaintiff the costs payable to the plaintiff under my order; and my Brother *Alderson* did so, by order dated the 20th of February, 1839, which order was served on the defendant.

No tender of the 1*l.* 7*s.* was made, and the plaintiff

Exch. of Pleas, 1840. proceeded, on the 30th of May, 1839, to make my order and allocatur a rule of Court.

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On this rule an appointment was obtained to tax further costs, and an allocatur given for 2*l.* 18*s.* 2*d.*, being the costs of making my order a rule of Court.

On the 1st of November, 1839, the plaintiff demanded the costs from the defendant; the demand was made *severally* of the 1*l.* 7*s.* and the 2*l.* 18*s.* 2*d.*; and copies of the rule and allocatur thereon were served. The affidavit does not state a refusal to pay these sums, or either of them, but simply that they had not been received. On the defendant's affidavit, it appears that he offered to pay the 1*l.* 7*s.* on such demand being made, which the plaintiff refused to receive.

The plaintiff nevertheless moved for and obtained a writ of attachment against the defendant, and it was issued on the 6th of November, and the defendant taken under it. The attachment was indorsed by order of the Court, dated 4th of November, 1839, at the instance of Wyatt, for nonpayment of 1*l.* 7*s.* and 2*l.* 18*s.* 2*d.*

An application was made to set it aside in the last term, and a rule nisi obtained; and we think the rule must be absolute.

An attachment is granted, not for disobedience of a Judge's order, but of a rule of Court: and all the rule of Court does in this case is to make my order a rule of Court, which is, constructively, to order that which it orders, viz. the payment of 1*l.* 7*s.* The result is, that, according to this form of order and rule, if the defendant postpones the payment of the sum ordered to be paid until the plaintiff has incurred the further costs of making the order a rule of Court, and then tenders the amount, he may put the plaintiff to an expense for which he has no remedy. To obviate this for the future, there should be a rule nisi for the payment of the costs occasioned by making the

order a rule of Court, which may be incorporated with the rule for making the order a rule of Court.

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Rule absolute (a).

(a) See now the rule of Court, ante, p. 602.

MAYER v. ISAAC.

ASSUMPSIT.—The declaration stated, that theretofore, to wit, on the 30th of November, 1838, in consideration that the plaintiff, at the request of the defendant, would sell and deliver to the defendant's nephew, one A. L. Vogel, china and earthenware, he the defendant promised and guaranteed to the plaintiff the payment of any bills the plaintiff might draw on account thereof, to the amount of £200. The declaration then averred, that the plaintiff, confiding, &c., did sell and deliver to the said A. L. Vogel, and the said A. L. Vogel bought of him, divers large quantities of china and earthenware, at prices amounting in the whole to a large sum of money, to wit, £2000: that the plaintiff afterwards, to wit, on the 10th of May, 1839, drew a bill of exchange on A. L. Vogel, at four months' date, for £200; that Vogel accepted the same for and on account of the sum of £200 due and owing from him to the plaintiff for the said prices of the said china and earthenware so sold and delivered to him, but that he did not pay the bill when due, &c.: Breach, that the defendant has not guaranteed to the plaintiff the payment of, or paid him, the said bill, or any part thereof, &c.

"In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200:"—
Held, a continuing guarantee, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than £200 had been supplied to and paid for by V.

Pleas—first, non assumpsit: secondly, that the plaintiff did not sell and deliver to the said A. L. Vogel, nor did the said A. L. Vogel buy of him, the said quantities of china and earthenware, or any part thereof, in manner and

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form, &c. : thirdly, that the plaintiff did not draw, nor did the said A. L. Vogel accept, the said bill in the declaration mentioned, for the sum of £200, due and owing from the said A. L. Vogel to the plaintiff for the said prices of the said china and earthenware, &c., in manner and form, &c. : fourthly, that after the said china and earthenware had been so sold and delivered by the plaintiff to the said A. L. Vogel as aforesaid, and whilst the said A. L. Vogel was indebted to the plaintiff for the same, and before the said bill became due, to wit, on the 10th of May, 1839, it was agreed by and between the plaintiff and the said A. L. Vogel, without the consent, leave, or license of the defendant, for a good and valuable consideration in that behalf to the defendant unknown, that the plaintiff should give to the said A. L. Vogel time, and forbear to sue him for a certain time in that behalf agreed on between them, to wit, for two months, for the payment of a large sum, to wit, £200, parcel of the sums in which the said A. L. Vogel was indebted to the plaintiff for the said china and earthenware; the said time and forbearance being for a longer time and a longer forbearance than the time and forbearance or credit which the plaintiff ought to have given the said A. L. Vogel for the payment of the said sum of £200, according to, and in pursuance and within the meaning of the said guarantee.—Verification. Fifthly, that after the making of the promise in the declaration mentioned, and before the commencement of this suit, to wit, on the 9th of May, 1839, the said A. L. Vogel delivered to the plaintiff, and the plaintiff then accepted of him, divers bills of exchange and monies, amounting in the whole, to wit, to £2000, in full satisfaction and discharge of the said promise, damages, and causes of action in the declaration mentioned.—Verification.

The plaintiff took issue on the three first pleas : to the fourth he replied, denying the agreement in that plea mentioned; and to the fifth, that A. L. Vogel did not deli-

ver to the plaintiff, nor did the plaintiff accept of him, the said bills of exchange and monies in the said plea alleged as amounting in the whole to £2000, in full satisfaction and discharge, &c., as in that plea alleged. On these replications also issues were joined.

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At the trial before *Gurney*, B., at the Middlesex Sittings after Hilary Term, it appeared that in June 1838, the plaintiff, a manufacturer of earthenware in Staffordshire, began to supply Vogel, the defendant's nephew, who carried on business at Brussels, and was introduced to him by the defendant, with china and earthenware. The plaintiff applied to the defendant for a guarantee of Vogel's payments, and the defendant gave him, in the first instance, a guarantee to the amount of £100. The plaintiff supplied Vogel, down to November 1838, with goods to the amount of £300: he then applied to the defendant for a further guarantee for £200, and received from him the guarantee declared on, which was as follows:—

“London, 30th Nov., 1838.

“Sir,—In consideration of your supplying my nephew, A. L. Vogel, with china and earthenware, I hereby guarantee the payment of any bills you may draw upon him on account thereof, to the amount of £200.

“G. ISAAC.”

After this guarantee was given, the plaintiff went on supplying goods to Vogel, to the amount in the whole of upwards of £1000, down to the beginning of April 1839, and during the same period he received from Vogel bills to the amount of upwards of £700, which were satisfied before the commencement of this action.

For the defendant it was objected, that this was not a continuing guarantee, and that it was at an end as soon as the plaintiff had supplied goods under it to Vogel, and received payment to the amount of £200. The learned

Exch. of Pleas, Judge reserved the point, and a verdict was given for the plaintiff, damages £200, leave being reserved to the defendant to move to enter a nonsuit.

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Whateley having obtained a rule nisi accordingly, citing *Bovill v. Turner* (a), *Melville v. Hayden* (b), and *Nicholson v. Paget* (c),

Erle and *Knowles* now shewed cause.—First, this is a continuing guarantee: but secondly, if it be not, there is no plea on the record under which the defendant can take advantage of the objection.—Although the line of distinction between what does or does not amount to a continuing guarantee, is not very clear, the authorities are in favour of this being so considered. It is not limited to any one individual supply, but contemplates a continuance of the dealings, and a course of bills that may be afterwards drawn, and the defendant makes himself liable for *any* bills among those so drawn, to the extent of £200. Where the words of the instrument will reasonably bear the construction of a continuing guarantee, they will be construed most strongly against the maker. The cases relied on for the defendant are all distinguishable. In *Bovill v. Turner*, the guarantee clearly contemplated one supply only, to the amount of £50. In *Melville v. Hayden*, the guarantee was “of the payments of A. M. to the extent of £60, at quarterly account, bill two months, for goods to be purchased by him” of the plaintiffs. There there was no reference to any continued course of dealing, unless the words “at quarterly account” could be so construed, which the Court held they could not. So also, in *Nicholson v. Paget*, where the words were, “I hereby agree to be answerable for the payment of £50 for F. L., in case F. L. does not pay for the gin, &c., which he receives from you,” one supply only was

(a) 2 Chit. 205.

(b) 3 B. & Ald. 593.

(c) 1 C. & M. 68; 3 Tyr. 164.

necessarily pointed at. [*Alderson*, B.—Mr. Baron *Bayley* *Exch. of Pleas*, 1840. MAYER
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(a) 12 East, 227.

(b) 2 Camp. 412.

(c) 2 C. & J. 13.

(d) 6 Bing. 244; 3 M. & P.

(e) 9 Bing. 618; 2 M. & Scott,

762.

(f) 3 Camp. 220.

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If it be, there are no words whatever to limit either time or amount. [*Parke, B.*—If the defendant only intended to pay for the first goods supplied, he would equally require a limit of amount.] The limit he does impose refers only to the amount of the default *at any time*.

But secondly, there is no plea under which the point can be raised. It clearly can be only under the fifth plea; and that does not allege in form that the guarantee has been satisfied.

Kelly and *Whateley*, in support of the rule.—The general principle of law, that *verba fortius accipiuntur contrà proferentem*, is not without exceptions; and certainly, if any exception be admitted, it ought to be in the case of a party who is binding himself as surety for another. In *Nicholson v. Paget, Bayley, B.*, in delivering the judgment of the Court, laid down the following principles :—" A guarantee is a contract of a peculiar description ; it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf, but it is a contract which he is entering into for a third person ; and we think it is the duty of the party who takes such a security, to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself. It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee, the extent to which he expects that the liability is to be carried." [*Parke, B.*—Do you find any other authority to support the rule of construction there laid down? It certainly is at variance with the general rule of the common law, that the words of an instrument are to be taken most strongly against the party using them. A guarantee is one of that class of obligations which is binding only on

one of the parties, until the other chooses by his own act to make it binding on him also. This instrument does not contain the words of both parties, but of one only, the defendant; the plaintiff agrees to nothing on the face of it.] The weight of authority would appear to be in favour of the last decision of the Court. But upon the fair and reasonable construction of the instrument, this is not a continuing guarantee. In all the cases cited on the other side, there were some words directly denoting the continuance of the instrument as a security, or the intention to be liable beyond the first supply. In *Allan v. Kenning*, the guarantee was given for the very purpose of inducing the plaintiff to continue his dealings with the party guaranteed. In *Bastow v. Bennett*, which is the strongest case for the plaintiff, the guarantee was for "any goods" to be supplied. Here, where the goods are mentioned, the word "any" is omitted; and there is nothing to shew that more was contemplated than one supply, or a series of supplies, to the extent of £200, for which payment should be made by bills. In *Mason v. Pritchard*, again, (which was remarked on in *Melville v. Hayden*, as having gone "as far as possible,") the words were, "any goods he hath or may supply:" in *Merle v. Wells*, "any debt he may contract." In *Hargreave v. Smee*, it was a guarantee for goods to be delivered according to the custom of trading between the parties, and therefore evidently contemplated a continuance of the same course of dealing. There is no case in which the guarantee has been held continuing, unless it contained some words applying to the goods themselves, (not to the manner in which they were to be paid for), shewing the contemplation of a continuous supply. The introduction of the mode of payment by bills can make no difference in the construction of the instrument. Then, would this guarantee be held a continuing one, if it had run thus—"In consideration of your supplying Vogel with China and earthenware, I guarantee the payment thereof to the

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Exch. of Pleas, amount of £200?" Clearly not, according to the authority of *Bovill v. Turner*, and *Melville v. Hayden*.

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The point is clearly raiseable under the last plea, which alleges payment by Vogel in discharge of the promises and causes of action in the declaration mentioned.

ALDERSON, B (a).—It is not necessary to give any opinion on the latter point, because we have come to the conclusion that this must be considered a continuing guarantee. There is a considerable difficulty in reconciling all the cases on this subject, arising principally from their not being at one as to the principle of decision: some laying it down that a liberal construction ought to be put upon the instrument in favour of the person giving the guarantee, as in *Nicholson v. Paget*; others that it ought to be strictly construed, as in *Mason v. Pritchard*. Undoubtedly, the generally received principle of law is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party. And therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason v. Pritchard*, than with the opinion of *Bayley, B.*, in *Nicholson v. Paget*. It was not, however, at all necessary for the decision in the case of *Nicholson v. Paget*, that it should depend upon the principle so stated. There the words of the guarantee were—"I hereby agree to be answerable for the payment

(a) *Parke, B.*, had left the Court during the argument.

of £50 for T. Lerigo, in case T. Lerigo does not pay for the gin, &c., he receives from you, and I will pay the amount." Taking that according to its plain meaning, it refers to some particular amount of gin which the party was to receive from the plaintiff: but here the words are more general; the defendant says, "In consideration of your supplying my nephew Vogel with china and earthenware, I hereby guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200;" that is, according to the plain and natural meaning of the words, "In consideration of your supplying my nephew generally with china and earthenware,—not any particular goods, but any china and earthenware,—I hereby guarantee you the payment of any bills you may draw on him on account of that general supply to be made to him." If that be so, it cannot be doubted that this is a continuing guarantee; it contemplates the continuance of a supply on the one side, and on the other a liability for any default during that supply; and then it defines the extent to which the defendant will be bound upon this continuing or running guarantee, viz. £200. According to the plain construction of the document, it is a continuing security, and falls within the decision in *Mason v. Pritchard* and the other cases referred to in the argument. It is not necessary, therefore, on the present occasion, to inquire into the principle of construction to be applied to instruments of this kind; because, according to the plain meaning of the words, as they would be understood by mercantile men, this is a continuing guarantee. The plaintiff is therefore entitled to retain his verdict.

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GURNEY, B.—I am of opinion, that on the fair import of this document, it is a continuing guarantee. No doubt such was the intention of the parties; and I think the words fully warrant us in carrying out that intention.

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ROLFE, B.—I am of the same opinion. It is conceded by the defendant's counsel, that if the promise had been in consideration of the supply of "any china and earthenware," the plaintiff would be entitled to recover; but it is said the case is different, because the guarantee is not given in respect of any china and earthenware, but "any bills," i. e. as it is argued, any bills drawn for the first supply of china and earthenware. I cannot agree to that construction. What is guaranteed is, payment of *any* bills drawn on Vogel for the price of the goods supplied to him. *Mason v. Pritchard* decides, that where it is for *any goods* supplied, it is a continuing guarantee; and I cannot appreciate the distinction taken between that case and the present. On the contrary, I think the instrument is more clearly continuing when given in respect of any bills; and for this reason, that it cannot be said that it is limited to the first lot of goods actually supplied, but only to the first supplied which is paid for by bills. I think the parties could not contemplate so strange a course of dealing, and therefore that the only reasonable construction is, that the defendant was to be answerable for any goods to be supplied, provided only that his liability should not extend beyond the £200.

ALDERSON, B.—My Brother Parke, before he left the Court, expressed to us his entire concurrence in the opinion we have delivered.

Rule discharged.

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THIS was an action on the case against the defendant for a breach of duty, in not being in attendance to give evidence in obedience to a writ of subpoena ad testificandum. The declaration was in the usual form, except that it did not allege that the defendant was called on his subpoena. Plea, not guilty. At the trial before Lord Abinger, C. B., at the Sittings after Hilary Term, the plaintiff's counsel opened the following facts. A writ of subpoena ad testificandum in the usual form had been served on the defendant, requiring him to attend and give evidence for the plaintiff in a certain action, in which the now plaintiff was the plaintiff, and one R. Southall was the defendant. When the cause was about to be called, the plaintiff's attorney ascertained that the now defendant was not in attendance; and being advised by his counsel that it was unsafe to proceed to trial without his evidence, he withdrew the record. The defendant had not been called on his subpoena by the officer of the Court; but satisfactory proof would be given that he was not in attendance, and that his attendance could not have been procured in time.—Upon this statement, the Lord Chief Baron interposed, and said that the plaintiff must be nonsuited, inasmuch as, in his opinion, in order to entitle the plaintiff to recover in an action of this kind, it must be shewn that the witness was called on his subpoena. On this expression of his Lordship's opinion, the plaintiff's counsel did not offer any evidence, and the plaintiff was accordingly nonsuited.

In an action against a party for not appearing to give evidence in obedience to a writ of subpoena ad testificandum, it is not necessary to shew that the defendant was called on his subpoena by the officer of the Court, if it be shewn by other satisfactory evidence that he was not present at the proper time and place when he was required to give evidence; or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence. And in such case it is not necessary that the jury should have been sworn and the plaintiff nonsuited; it is sufficient if he withdrew the record, being unable safely to go to trial in the absence of the witness.

Thesiger having obtained a rule nisi for a new trial, citing *Barrow v. Humphreys* (a), *Rex v. Stretch* (b), *Mullett v. Hunt* (c), and *Davis v. Lovell* (d),

(a) 3 B. & Ald. 598.

(b) 3 Ad. & Ell. 503.

(c) 1 C. & M. 752; 3 Tyr. 875.

(d) 4 M. & W. 679.

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Crowder and Swann now shewed cause.—The plea of not guilty puts in issue all the facts alleged in the declaration, which are necessary to shew that there was a breach of duty in the defendant. If then it be necessary, before he could be guilty of any breach of duty, that he should have been called upon his subpoena, that fact is in issue on these pleadings. If he was not so called, and it is necessary that he should be, he did not neglect or refuse to attend, in the terms of the declaration. [*Parke, B.*—If your argument be good, the question is, whether there may not be an objection to the declaration, for not averring that the defendant was called. *Alderson, B.*—The first question is, whether, on this record, it is necessary to prove the calling of the defendant; the second, whether it be in all cases necessary to call the witness, even if he be not there.] *Malcolm v. Ray (a)* appears to be a decision directly in favour of the defendant, although it must be admitted that its authority is shaken by subsequent cases. It was there held, that an affidavit in support of an application for an attachment against a witness for disobedience to a subpoena, was defective for not stating that he was duly called at the trial. The precedents, also, all allege that the defendant was called (*b*). In *Mullett v. Hunt*, the present question did not arise. There the defendant was in fact called on his subpoena, and it was so averred in the declaration: and the necessity of calling him seems to have been assumed by the Court. *Bayley, B.*, says, “If the Judge suffers the witness to be called on his subpoena, without the jury being sworn, and the witness does not appear, I think the plaintiff has a right to withdraw his record.” In *Dixon v. Lee (c)*, *Alderson, B.*, certainly intimated an opinion, that when the witness is not in fact in attendance, it cannot be necessary, because

(a) 3 B. Moore, 222.

473; 8 Bing. 224; 1 C. & M. 752.

(b) See 2 Chit. Pl. 531; 9 East,

(c) 1 C., M., & R. 645.

it would be useless, to call him on his subpoena; but there also, the decision proceeded on another ground. In *Barrow v. Humphreys* (a), the Court only expressed an inclination of opinion, (as was afterwards decided in *Mullett v. Hunt*), that the witness was in contempt by neglecting to attend, although the cause was not called on for trial, he having been called on his subpoena. In *Rex v. Stretch* (b), the Court expressly declined to decide the question now in discussion. [Lord Abinger, C. B.—The subpoena binds the witness to be there from day to day, until the cause is tried.] But he cannot *appear* in the box as a witness, until called for that purpose; until he be so called, therefore, it can hardly be said that he has disobeyed the injunction of the writ, “to appear to testify the truth.”

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Thesiger and *Busby*, contra.—The circumstances opened in this case sufficiently shewed a breach of duty in the defendant. There may well be a distinction between the case where the witness is in fact in attendance upon the Court, and where, as in the present case, he was altogether absent, and no object could have been answered by calling him on his subpoena. It is a matter, not of the essence of the case, but of evidence, whether the calling of him was necessary or not: and that is the distinction taken by *Alderson*, B., in *Dixon v. Lee*, and also by *Patteson*, J., in *Rex v. Stretch*. There is no rule of law which compels a plaintiff, who obtains a subpoena ad testificandum, to do more than duly to serve the party with the writ; it is a common-law writ, and the party is bound to obey it at his peril: *Amey v. Long* (c), *Mullett v. Hunt*. The requisition of the writ is, that “all other things being set aside, and ceasing every excuse,” he shall appear in Court on a day named therein, “and from day to day until the cause is tried.” The requisition is absolute, not conditional. The proposition

(a) B. & Ald. 598.

(b) 3 Ad. & E. 503.

(c) 9 East, 473.

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contended for on the other side is in effect this, that the witness may absent himself until the instant when he is formally called on by the officer of the Court: but that is wholly at variance with the large and general requisition of the writ. The legal effect and obligation of the writ of subpoena was much considered in *Collins v. Godefroy* (a). Lord *Tenterden* says—"If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law." The writ itself does not require the witness to be called. The question is not whether that be a convenient *practice* or not: the onus lies on the defendant to shew that it is the *law*. There is no obligation on the plaintiff de hors the writ, and the writ imposes no such duty.

Lord ABINGER, C. B.—We think this rule must be made absolute for a new trial; although we do not intend therefore to be understood as laying down any rule that a party may sustain an action against every person summoned by him as a witness, who is not present at each particular moment of the assizes or sittings for which he is summoned: for although to be present there is a duty which the witness owes to the Court, yet he sufficiently discharges his duty to the party who summons him, if he be there when his evidence is wanted, and he is called upon *ad testificandum*. Here the cause of *Lamont v. Southall* was actually called on in its turn, and the period had arrived when the presence of the defendant as a witness was essential to the discharge of his duty to the plaintiff. The case of *Mullett v. Hunt* has decided, that in order to render the witness liable to an action for disobedience

(a) 1 B. & Adol. 950.

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to the subpoena, it is not necessary that the jury should have been sworn in the cause, but it is enough if the party, being in other respects ready to try, have forborne to swear the jury in consequence of the absence of the witness, and have called him on his subpoena before withdrawing the record. I do not apprehend, however, that on an examination of the principles upon which that case was decided, it will be found to have been held essential that the witness should be called on his subpoena at all. I adopt the argument of Mr. *Thesiger*, that it is a matter not of *essence*, but of *evidence*; although it is a species of evidence which it is most important should be obtained, and I should in general be much disposed to indulge the propensities of jurymen to find for the defendant in actions of this nature, whenever it appeared that the witness had not been called on his subpoena; because, in general, until he be so called, how can any one undertake to say that he was not or might not be present? There may, however, be cases where the calling of him would be merely an idle ceremony; as if it were shewn that he had gone to France two days before the trial, or the like. Therefore it appears to me, on the principle laid down in *Mullett v. Hunt*, we are safe in deciding that in the present case the plaintiff ought to be at liberty to shew, that when the record was called on to be tried, the witness was in such a place that he could not possibly come to obey the subpoena: and that that is a sufficient breach of duty to the plaintiff to ground an action of this nature. That is the opinion to which the Court are at present inclined, and therefore I admit that I was wrong in my ruling at *Nisi Prius*, when I said that I would adhere to the old practice of requiring it to be proved that the witness was called on his subpoena. But although we are inclined to that opinion, it is now for the first time decided that this action may be maintained for disobeying a subpoena, although the party was not called upon it at any time. The rule will be made

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absolute for a new trial, and the defendant may then, if he think fit, raise the question of law by tendering a bill of exceptions.

PARKE, B.—I also think that this rule ought to be made absolute. According to the exigency of the writ of subpoena, the party is commanded to be in attendance before a certain tribunal, at a certain place and on a certain day, and so on from day to day until the cause is tried, in order to testify and give evidence in a certain cause. So far as regards the party suing out the subpoena, the only obligation imposed upon the witness is, that he shall be present and forthcoming when he is wanted for the purpose of giving evidence in that cause; and the precise moment is, when the counsel who conducts the cause requires his presence. Now the case of *Mullett v. Hunt* has decided, that if the witness be absent when the cause is called on for trial, and it is then clear that he will not be forthcoming when his evidence will be required, the plaintiff is not bound to swear the jury, but may withdraw the record, and maintain an action against him. In that decision I quite concur. It is enough, therefore, if the plaintiff shew that the defendant was at that time absent, and under such circumstances, that when the moment should arrive at which he would be called on to give evidence, he would not be forthcoming. Then the question is, how is this state of things to be proved? Is it only by proof that the witness was called on his subpoena, and is no other evidence admissible for the purpose? Now I agree that the question is open on this record; but it seems to me, that although the calling of the witness on his subpoena is one, and a very satisfactory, species of evidence by which the fact of his absence may be established, it is not the only species. It would surely be sufficient, if it were shewn that the witness was a hundred miles off during the whole period of the assizes. In fact, the practice of call-

ing the witness on his subpoena, when strictly examined, is out of place; because, properly speaking, the calling of him should be at the moment when he is wanted to give evidence: but it is a useful practice, as furnishing good evidence of his absence at the required time and place. Still it is not the only kind of evidence by which his absence can be substantiated, and it is not essential to the plaintiff's case to shew that that form was gone through. For these reasons, I think that the Lord Chief Baron was wrong in withdrawing this case from the jury, and that the rule must be absolute for a new trial.

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ALDERSON, B.—I entirely concur in what has been said. It is not necessary to call a witness on his subpoena, if by clear evidence you can shew that he is absent altogether, so as to be unable to come and give evidence, and therefore that the calling him would be a mere useless ceremony. If he be absent altogether, he has disobeyed the subpoena, which requires him to attend to testify. I think, however, that there is much convenience in the practice; if there be contradictory evidence as to the fact of the witness having been absent, it is a useful mode of establishing the truth, and ought, perhaps, to turn the scale.

ROLFE, B.—I am of the same opinion. The writ of subpoena commands the party to appear before the Court to give evidence in the cause. There is nothing in it which says that he is to appear there when called on by the officer of the Court. The question is, has he appeared at the proper and necessary time? If he be proved, by whatever species of evidence, to have been then absent, that is a breach of his duty, and entitles the plaintiff to recover.

Rule absolute.

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HUMPHREYS v. The EARL of WALDEGRAVE.

A plea to an action by the holder of a cheque, that the consideration for the making of it was money won by a third party of the defendant at hazard, in a common gaming-house, is not an issuable plea, within the meaning of an order to plead issuably.

THIS was an action by the holder of a cheque for £300 made by the defendant, payable to bearer. The defendant, being under terms to plead issuably, obtained a Judge's order to plead several pleas, the 4th of which was (in substance) that the sole consideration for the making of the cheque was money won of the defendant by one Barnett, at a common gaming-house, at the game of hazard, contrary to the statute, &c. The plaintiff having signed judgment as for want of a plea, a rule nisi was obtained to set it aside for irregularity, against which

Wightman shewed cause.—The question is, whether the pleas pleaded by the defendant are issuable pleas, within the meaning of the rule of Court. It will be said that the fourth plea is an issuable plea: but it does not try the merits of the action; even if true, it is no defence against the present plaintiff. The meaning of an issuable plea is, such a one as that if an issue be taken on it, it decides the merits of the cause. [*Parke, B.*—This would have been a good plea before the recent statute, 5 & 6 Will. 4, c. 41, but not since. The plaintiff would clearly be entitled to judgment non obstante veredicto. If it be not an issuable plea, the defendant cannot set aside the judgment without an affidavit of merits.]

Humfrey, contra, was then called on.—The question here is not whether the plaintiff might have judgment non obstante veredicto, but whether a distinct issue of fact can be taken on the plea. The rule laid down in *Sawtell v. Gillard (a)* is, "that where a party has obtained time on the terms of pleading issuably, and by his pleading fails to

bring the merits of the case, or some question of fact, or some question of law arising upon the facts, in issue, he does not comply with the conditions of the order." [Parke, B.—That must mean some question of fact which may determine the cause of action.] If so, the qualification there introduced would be unnecessary, because the first branch of the proposition would include that case. [Alderson, B.—The last clause in that paragraph applies to a general demurrer: the other words mean the pleading of some matter of fact on which the plaintiff may go to trial, and determine the cause of action, without being driven to a demurrer. Parke, B.—Mr. Tidd states the rule thus (a):—"An issuable plea is a plea *in chief* to the merits, upon which the plaintiff may take issue and go to trial." There must be an issue tendered on some plea, which, if true, would be an answer to the action.] At all events, the plaintiff ought to have moved to set aside the Judge's order allowing these pleas, and not to have signed judgment. [Parke, B.—No—all that the Judge decides is, that they may be pleaded together, without deciding whether they are issuable or not. The Judge's order only does away with the objection of double pleading.]

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PER CURIAM,

Rule discharged, with costs (b).

(a) 9th Edit. p. 471.

Wettenhall v. Graham, 4 Bing. N.

(b) See *Staples v. Holdsworth*, C. 714; 6 Scott, 603.

4 Bing. N. C. 144; 5 Scott, 432;

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DAVIS v. COLE.

Where, in an action for assault and battery, the plaintiff recovered less than 40*s.* damages, and the Judge, at the trial, intimated his intention of certifying to deprive the plaintiff of costs, under the 43 Eliz. c. 6, but after four days the plaintiff obtained the record from the associate, no certificate being then indorsed on it, and signed judgment, and the Master, on production of the record, taxed the plaintiff his costs: the Court confirmed an order of the Judge, for producing the record before him, in order to indorse the certificate upon it, and for setting aside the judgment and taxation.

THIS was an action for assault, battery, and false imprisonment, to which the defendant pleaded not guilty only. At the trial, before *Gurney, B.*, on the 6th of May, the plaintiff recovered a verdict with 1*s.* damages, and the learned Judge, on the application of the defendant's counsel, expressed his intention of certifying to deprive the plaintiff of his costs, under the 43 Eliz. c. 6. After the expiration of four days from the trial, the plaintiff obtained the *Nisi Prius* record from the associate, no certificate being then indorsed on it. On the 14th of May the plaintiff signed final judgment, and gave notice of taxation on the 15th, when the defendant's attorney accordingly attended, and objected to the taxation being proceeded with, on the ground that the learned Judge had intimated his intention to certify. The Master, however, thought that as the record produced before him bore no such certificate, he had no option but to proceed, and he therefore taxed the plaintiff his full costs, and made out his *allocatur* accordingly for 29*l.* 1*s.*, which the defendant's attorney paid under protest. The defendant then applied to *Gurney, B.*, for a summons to produce the record before him, for the purpose of indorsing the certificate upon it; and his Lordship, on the 16th of May, made an order upon the plaintiff to produce the *Nisi Prius* record and *postea* for that purpose, and also to set aside the taxation, and alter the judgment as to the amount of costs. On the 22nd, the learned Judge made another order confirming the former, except that it directed the payment by the defendant of such costs as the plaintiff had incurred, by reason of the defendant not having applied to the associate to draw up the order before the judgment was signed and costs taxed.

Mansel now moved to set aside these orders.—A Judge

is bound to certify under the statute of Elizabeth before judgment is signed, or at least before the costs are taxed. Perhaps it might be competent for him to enter upon the record a minute or memorandum of his intention to do so, but a mere verbal intimation can have no effect. *Godson v. Lloyd* (a), *Whalley v. Williamson* (b). The defendant ought to have obtained the certificate, and produced it before the Master on taxation; it was for him to take the necessary steps to carry out the intention of the Judge.

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Cole appeared to shew cause in the first instance, but was stopped by the Court.

LORD ABINGER, C. B.—The fault rested with the officer of the Court, who ought not to have delivered the record to the plaintiff without the certificate. The possession of the record by the clerk is the possession of the Judge; he holds it as his officer, and when he gives it out to the party, it is under a presumed authority from the Judge for that purpose. If the Judge himself had been applied to by the plaintiff, it is plain his answer would have been, that he would not let it go until he had indorsed his certificate.

PARKE, B.—Here the Judge certified by word of mouth at the trial, and it was the misprision of the clerk in not setting down the certificate formally on the record, and presenting it to the Judge for his signature.

Rule refused.

Cole then moved for and obtained a rule nisi for setting aside the second order of *Gurney, B.*, citing *Foxall v. Banks* (c): which rule, after argument on a subsequent day, was made absolute.

(a) 4 Dowl. P. C. 157.

135; 7 Dowl. P. C. 253.

(b) 5 Bing. N. C. 200; 7 Scott,

(c) 5 B. & Ald. 536.

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DORE v. HAYDEN.

Issue joined, in a country cause, in Michaelmas Vacation, and no notice of trial given. A motion for judgment as in case of a nonsuit, in Trinity Term, is too soon: for the issue joined in vacation is referred to the subsequent term.

THIS was a country cause: issue was joined on the 1st of January, 1840, (the affidavit stated, "as of the preceding term"), and no notice of trial given. The plaintiff not having proceeded to trial,

Locke now moved for judgment as in case of a nonsuit, and cited *Williams v. Edwards* (a) and *Lister v. Ventom* (b), as authorities to shew that the motion was not made too soon.

PER CURIAM.—The decision in *Lister v. Ventom* proceeded upon a mistake. When issue is joined in vacation, it must be considered as being joined of the next following term, and the mere statement in the affidavit that it was joined as of the preceding term, can make no difference. Here, therefore, the issue must be taken to have been joined in Hilary Term, and consequently, according to the recent decisions, the motion is premature (c).

Rule refused.

(a) 1 C., M., & R. 583.

(b) 7 Dowl. P. C. 691.

(c) See *Evans v. Barnard*, 3 M. & W. 376; 6 Dowl. P. C. 367; *Williams v. Davis*, 5 Bing. N. C. 227; 7 Scott, 158; 7 Dowl. P. C. 246; *Harrison v. Williams*, 6 Dowl.

P. C. 772; *Apperley v. Morse*, 6 Dowl. P. C. 505; *Heath v. Borall*, 7 Dowl. P. C. 19. The same point was decided in this court a few days subsequently in *Douglas v. Darlaston*.

IBOTSON v. PHELPS.

Service of a rule by giving it to the defendant's servant at his warehouse, that being his usual place of business, held insufficient.

STREETEN moved to make absolute a rule to compute principal and interest on a bill of exchange. The affidavit

stated the rule nisi to have been served, by leaving it with the defendant's warehouseman at his warehouse, No. 4, Mark Lane, which was stated to be his usual place of business.

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PER CURIAM.—That is not sufficient; if it had been upon a domestic servant at the defendant's residence, it would have been different.

Rule refused.

PALMER v. POWELL.

THIS was an action brought by the plaintiff, as barrister and assessor to the Commissioners of the Court of Requests at Bristol, against the defendant, whom he had appointed, at his request, and for certain rewards to him payable in that behalf, to collect the fees which should become due to him as such assessor, and in consideration of which, he the defendant undertook and promised to collect the same according to their full legal amount. The declaration alleged that divers fees had become due to the plaintiff from divers persons, and on divers occasions, and alleged as a breach, that the defendant collected as the fees on those occasions, fees of lower amount than were by law due to him.

The defendant, by his plea, admitted that he had collected the fees, but alleged that they were not of lower amount than was by law due to the plaintiff; upon which issue was joined: and afterwards, by consent, the following

By a local act of Parliament, 56 Geo. 3, a Court of Requests was created at Bristol, and certain fees, according to a table therein contained, were fixed to be paid to the assessor and officers of the Court, with power for the justices of the peace for the said city, at any general quarter sessions of the peace, to lessen or reduce them. By 6 & 7 W. 4, c. 105, s. 8, it is enacted, "that every thing provided in any local act of Parliament, to be done by the

justices, or by some particular class or description of members of such body corporate, being justices at some court of general or quarter sessions assembled, and which does not relate to the business of a court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council." The town council of Bristol, acting under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 124, and 6 & 7 W. 4, c. 105, s. 8, by an order of council, reduced the fees payable to the assessor and clerk of the Court:—*Held*, that the regulation of the fees of the Court of Requests was a matter relating to the business of a court of civil judicature, and that the town council had no authority to interfere with it.

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case was agreed to, under a Judge's order, for the opinion of this Court.

The city of Bristol, and county of the same city, has a mayor, alderman, recorder, justices and town councillors, and a Court of quarter sessions, under the statute 5 & 6 W. 4, c. 76 (the Municipal Corporation Act); and prior to that act it had a mayor, alderman, and recorder, (who were justices), and a Court of quarter sessions by charter.

Previous to the said statute 5 & 6 W. 4, c. 76, by an act passed in the 56th year of the reign of his late Majesty King George 3rd, intituled, "An Act for the more speedy and easy recovery of small debts in the city and county of the city of Bristol, and in the liberties thereof, and in the several parishes and places therein mentioned, in the counties of Gloucester and Somerset," the mayor, aldermen, and common council for the said city of Bristol for the time being were empowered to appoint commissioners for the recovery of small debts above 40s., and not amounting to any sum for which an arrest on mesne process may by law take place, within the said city and county of the said city, and the liberties thereof, and in the several parishes therein mentioned; and the said commissioners and their successors are, by the said last-mentioned act, constituted a court of justice, by the name of the Court of Requests for the city and county of the city of Bristol, and the liberties thereof, and the several parishes &c.; and the said commissioners are by the said last-mentioned act empowered and required to meet and to hold the said Court on every Tuesday in the guildhall of the said city, or any of the rooms and apartments thereto adjacent, or in some other convenient place within the same city, to be appointed by the mayor, aldermen, and common council for that purpose. By the 2nd section of the act, the mayor, aldermen, and common council of the said city for the time being, are empowered to nominate and appoint a practising barrister-at-law, who shall have been called to the

bar for the space of six years at the least, and who shall have actually practised as a barrister for the space of six years at the least, as assessor to the said commissioners, and such barrister, or in the case of his absence, a like barrister to be substituted by him for each particular occasion, and to be approved by the chairman of the said commissioners for the time being, shall sit at every court.

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By the 29th section of the said last-mentioned act, it is enacted, "that the several fees therein and hereinafter limited and expressed, (exclusive of stamps), shall be taken by the said barrister, and by the clerk, serjeant, and crier of the said court, for their several and respective services, in the execution of the said act for the recovery of all sums not amounting to £15, viz. [setting out a schedule of fees for summonses, hearings on trial, orders, decrees, or judgments, paying money into Court, references, attachments, nonsuits, &c.] And the said commissioners shall, and they are by the said last-mentioned act required, to hang up and affix, or cause to be hung up and affixed, a table of all such fees in some conspicuous place of the said Court, or place of meeting of the said commissioners, in order that all persons concerned may be enabled to peruse the same."

By the 30th section of the said last-mentioned act, it is enacted, "that it shall and may be lawful to and for the justices of the peace in and for the said city and county of Bristol, at any general quarter sessions of the peace, or any adjournment thereof to be held after some preceding Court of quarter sessions, shall have determined that it would be advisable so to do, to *lessen or reduce* all or any of the fees limited and allowed to be demanded as aforesaid, and afterwards from time to time, in the same manner, to advance all or any of the said fees so lessened or reduced, to any sum not exceeding the several and respective sums hereinbefore mentioned and specified."

Soon after the passing of the last-mentioned act, the table of fees in the same act, and hereinbefore particularly

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set forth, was duly hung up and affixed in a conspicuous part of the said Court or place of meeting, and the fees thereby authorized to be taken were in fact taken by all the different officers of such Court, according to the amounts in the same act set forth, until the making of the orders of council hereinafter mentioned.

By the statute 6 & 7 W. 4, c. 105, s. 8, it is enacted, "that every thing provided under any local act of Parliament, to be done exclusively by any particular or limited number, class, or description of the members of any body corporate named in the schedules A. & B., annexed to the said act for regulating corporations, the continuance of which is not inconsistent with the provisions of the said act, and also every thing provided in any such local act to be done by the justices, or by some particular class or description of members of such body corporate, being justices of some Court at general or quarter sessions assembled, *and which does not relate to the business of a Court of criminal or civil judicature*, shall and may be done by the council at some quarterly meeting of the council, or by some committee of the council, or any three or more of such committee, to be appointed at a quarterly meeting of the council, provided that every thing herein authorized to be done at a quarterly meeting of the council may be done at a meeting of the council, to be specially summoned for that purpose, as soon as may be after the passing of this act: Provided also, that no recorder, by virtue of his office, shall have power to allow or apportion, make or levy, or do any act whatsoever with relation to the allowance, apportionment, making, or levying of any rate whatsoever."

The case then stated, that at a quarterly meeting of the council of the city of Bristol, held on the 2nd of May, 1838, an order of council was made, (a copy of which was set out), which, after reciting the clauses of the several acts of Parliament before mentioned, concluded as follows:—
"And whereas the council at this quarterly meeting, having taken into consideration the fees payable to the barrister and

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clerk of the said Court, for their several and respective services in the execution of the first recited act, *do determine that it will be advisable to lessen and reduce* such of the fees payable to the barrister and clerk of the said Court, as are set out in the underwritten schedule, agreeably to the scale mentioned and set forth in the said schedule." Then the schedule was set out.

And at a certain other meeting of the council of the said city, held on the 1st of August, 1838, the following order of council was made—(setting out the order)—by which the council at that meeting, being the quarterly meeting next after the said meeting of the 2nd of May last, having taken into consideration their said resolution, did thereby *confirm the same*, and did accordingly *reduce and lessen* such of the fees to be taken by the barrister and clerk of the said Court as are set out in the said schedule, &c.

The case then stated, that the said Court of Requests had been always, and still was, regularly held, since the statute 56 Geo. 3, on every Tuesday, at the Guildhall of the said city. That the plaintiff is now, and for some time before the commencement of this action was, the barrister and assessor of the said Court of Requests, having been duly appointed thereto on the 6th day of February, 1839, and hath from the time of his said appointment performed the duties of such office, but hath never taken the fees mentioned in the reduced table directed by the said orders of council, or in any manner consented to or acquiesced in such reductions.

The defendant, on the 9th day of November, 1839, was appointed by the plaintiff, (so being such barrister and assessor as aforesaid), for a pecuniary consideration, to collect fees due to the plaintiff as such barrister and assessor as aforesaid, from thenceforth until further order, which employment the defendant accepted accordingly, and engaged to collect the same according to their full legal amounts respectively, and in fact collected fees for the plaintiff on all

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occasions on which fees became due to him as such barrister or assessor, before the commencement of this action; but collected the same according to the reduced table directed by the said orders of council, and not according to the table set forth in the said act of the 56 Geo. 3.

The question for the opinion of the Court is, whether the fees legally due to the plaintiff as such barrister or assessor on the occasions aforesaid, were according to the original table in the said act of the 56 Geo. 3 set forth, or according to the reduced table directed by the said orders of council.

The *Attorney-General*, for the plaintiff.—It is quite clear that the plaintiff was entitled to the fees according to the original table, unless they were properly reduced by the town council. And the town council had no power to reduce them, unless they had such power under the 6 & 7 W. 4, c. 105, s. 8. That section enacts, that every thing provided in any local act of Parliament to be done by the justices, or by some particular class or description of members of such body corporate, being justices at some Court of general or quarter sessions assembled, and *which does not relate to the business of a Court of criminal or civil judicature*, shall and may be done by the council." Now, does not the regulation of these fees relate to the business of a Court of civil judicature, within the meaning of that exception? It most clearly does. If these are fees which the suitors are to pay for business done in the Court, it is a subject relating to the business of the Court; and it is clear that it is a Court of civil judicature. The town council were, therefore, expressly excluded from acting in the matter, and had no authority to reduce them. If, however, it were a *casus omissus*, and the power which belonged to the justices under the 56 Geo. 3, remained, the town council would have had no such authority. But the power which formerly belonged to

the justices is now vested in the recorder, by 5 & 6 W. 4, c. 76, s. 105. By that section it is enacted, "that the recorder of every borough shall hold once in every quarter of a year, or at such other and more frequent times as the said recorder in his discretion may think fit, or as his Majesty shall think fit to direct, a Court of quarter sessions of the peace in and for such borough, of which the recorder of such borough shall sit as the sole judge: and such Court of quarter sessions of the peace shall be a Court of record, and shall have cognizance of all crimes, offences, and matters whatsoever, cognizable by any Court of quarter sessions of the peace for the counties in England, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole Judge, as fully as any such last-mentioned Court:" with an exception as to making and levying any county rate, and granting licenses, &c. So that the recorder may do all things, with that exception, that could formerly be done by a Court of quarter sessions. That section has received a construction in the case of *The Queen v. The Recorder of Hull* (a), where it was held, that the recorder, by that section, had the powers relating to inspectors of weights and measures, given by s. 17 of the stat. 5 & 6 W. 4, c. 63, to the magistrates in quarter sessions assembled. Then if the recorder has jurisdiction over weights and measures, over which before that act the justices in quarter sessions had jurisdiction, in like manner the powers given by the 56 Geo. 3 to the justices in quarter sessions, are transferred to the recorder. But even if they be not, the Court must be satisfied that the power is vested in the town council. The words, "a Court of criminal or civil judicature," do not apply solely to a Court of quarter sessions, but extend to any Court having civil or criminal business. The Court of Requests is a Court

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(a) 8 Ad. & Ell. 638; 3 Nev. & P. 595.

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of civil judicature, and the reception of the fees for business done in it relates to the business of a Court of civil judicature, with which the town council are excluded from interfering.

Sir *F. Pollock*, *contra*.—The town council, under this act of Parliament, had authority to reduce the fees payable to the assessor. The legislature intended to give to the recorder power over all matters of a civil or criminal nature within the borough, which came before him for decision; but to refer all other municipal business to the town council. It is plain, that by s. 124 of the stat. 5 & 6 W. 4, c. 76, the town council possess the power of regulating the fees payable to the clerk of the peace, the clerk to the justices, registrar, and officers of any Court of record in any borough. The words in the 8th section of 6 & 7 W. 4, c. 105, "which relate to the business of a Court of criminal or civil judicature," refer to the *judicial* business of the Court; but the regulation of the Court fees does not relate to such business. Whatever may be done at any Court of general or quarter sessions, which does not relate to the judicial or Court business of a Court of that nature, or to business of a criminal or civil nature, is to be done by the council; and as the regulation of the fees has no such relation, the town council had authority to reduce them. The legislature intended to make a distinction between business which is and that which is not of a judicial nature; all that involves the decision of the Court the town council are excluded from interfering with, but none other.

The Attorney-General replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—There was a case of *Palmer v.*

Powell, argued by the *Attorney-General* and Sir *Frederick Pollock*. It was an action brought to recover what was claimed to be due to the plaintiff for certain fees, to which he was entitled under an act of Parliament passed for forming a Court of Requests at Bristol. By way of defence it was contended, that by the act of the 6 & 7 Will. 4, c. 105, a power was given to the town council to reduce the fees, and they having in exercise of that power reduced the fees, and placed the reduced fees in a schedule, the defendant contended that the plaintiff was only entitled to recover according to that reduced scale. It appears that by the original act the fees were scheduled at certain fixed sums, and power was given to the justices of the peace in quarter sessions assembled to reduce the fees, if they thought fit, by a new table; and they had also power given them to advance the fees so lessened or reduced, to any sums not exceeding the original amounts. Now if this reduction had taken place under the authority of that act by the justices of the peace, undoubtedly the plaintiff must be content with the reduced fees. The question is, whether by the last act of Parliament the town council were authorized to do that which the justices of the peace were authorized to do before; and that depends on the 8th section of the 6 Will. 4, c. 105, the material words of which are—"And be it enacted, that every thing provided under any local act of Parliament to be done exclusively by any particular or limited numbers, class, or description of the members of any body corporate named in the schedules annexed to the said act for regulating corporations, the continuance of which is not inconsistent with the provisions of this act, and every thing provided in such local act to be done by the justices, or by some particular class or description of members, or of such body corporate being justices, at some Court of general or quarter sessions assembled, and which does not relate to

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the business of a Court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council." The council have reduced these fees at a quarterly meeting, and the question is, whether under these words they have a right to do so. After some consideration, we are all of opinion that the reduction of fees of the Court of Requests is a matter which relates to the business of a Court of civil judicature, and that this clause excludes from the council the power of interfering in any such case. It is impossible to say that this Court of Requests does not fall within the description of a "Court of civil judicature:" and there is nothing to limit the words, as was contended for on the part of the defendant, to that which is strictly the *judicial* business of such Court. We therefore think the plaintiff is entitled to judgment.

Judgment for the plaintiff.

KIRK v. DOLBY.

Where a writ of summons was by mistake dated the 4th of April, the præcipe being dated the 4th of May:—*Held*, that a Judge had power to order an amendment of the writ, so as to make it correspond with the præcipe.

MARTIN had obtained a rule to shew cause why an order of *Gurney*, B., allowing the writ of summons in this cause to be amended, should not be rescinded. It appeared that the præcipe for the writ was dated the 4th of May, but the writ issued upon it was by mistake dated the 4th of April. A summons was taken out, calling upon the defendant to shew cause why the learned Judge should not be at liberty to amend the writ of summons, by substituting the word "May" for "April," so as to make it correspond with the præcipe; and the learned Judge, after hearing the parties on both sides, ordered the amendment to be made. Against the above rule

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Humphrey now shewed cause.—There is no reason why the learned Baron should not have power to make such an order as this. The rule of Michaelmas Term, 3 Will. 4, s. 10, expressly says, that where the plaintiff shall omit to insert in any writ or copy thereof any of the matters required to be inserted therein, such writ, &c., shall not be void, but may be set aside as irregular, upon application to the Court out of which the same shall issue, or to any Judge. If an application had been made to set aside the writ for irregularity, the Court would have allowed an amendment on payment of costs. The writ itself is not void, and it is difficult to see why a Judge should not have power to set it right by ordering an amendment. [*Parke, B.*—After the passing of the Uniformity of Process Act, the Judges determined not to allow any amendment except in cases where, if the amendment were not allowed, the Statute of Limitations would be a bar to any new process, and so occasion a failure of justice.] It was on that ground, that in *Lakin v. Watson* (a), the Court allowed a writ of summons to be amended by inserting the name of a co-executrix as a co-plaintiff. In *Siboni v. Kirkman* (b), it was held that the omission of a similiter was amendable under the Statute of Amendments, 28 Hen. 8, c. 12, s. 2, as misprision of the clerk, even after final judgment, and after a writ of error had been brought, and omission assigned for error.

Martin, in support of the rule, referred to *Partridge v. Wallbank* (c), *Hodgkinson v. Hodgkinson* (d), *Lakin v. Watson* (e), and *Byfield v. Street* (f). [Lord Abinger, C. B.—

(a) 2 C. & M. 686.

(b) 3 M. & W. 46.

(c) 1 M. & W. 316.

(d) 1 Ad. & Ell. 533; 3 Nev. & M. 564.

(e) As reported in 4 Tyrw. 839, where the rule is laid down generally, without any qualification.

(f) 10 Bing. 227; 3 M. & Scott, 407.

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This being the first case in which the question has arisen as to the propriety of an amendment, where the præcipe is right and the writ wrong, we wish to consult the other Judges, in order that the practice may be uniform. *Parke, B.*—It seems very hard that we should be more strict in this stage of the cause, while the proceedings are in paper, than after the proceedings are on the record, when, by the Statutes of Amendment, they may be amended at any period.]

Cur. ad. vult.

On a subsequent day, the judgment of the Court was delivered by

PARKE, B.—In this case there was a variance between the writ of summons and the præcipe; the former being dated the 4th of April, and the præcipe the 4th of May. My Brother *Gurney*, on application, had allowed an amendment to be made, so as to make the month in the writ correspond with the præcipe, which was correct. On a motion to rescind the above order, it was said in argument, that the Courts had come to the conclusion not to allow amendments in cases of this kind, and that the only exception to that rule was in cases where, unless the amendment were made, the plaintiff would be without remedy, in consequence of the Statute of Limitations operating as a bar to a fresh action; but that the general rule was, that no amendment was to be made. We were disposed to think that this amendment might be made under the Statutes of Amendment, on the ground of its being a misprision of the clerk. We wished, however, to come to a uniformity of decision on the point, and have therefore consulted the Judges of the Courts of Queen's Bench and Common Pleas; and the result is, that we think this exception also may be introduced, that an amendment may

be made by which a writ of summons is made to correspond with the præcipe. The order of my Brother *Gurney* must therefore be sustained, and the rule be discharged.

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Rule discharged.

SPRY, Clerk, v. EMPEROR.

THIS was an action for money had and received, to which the defendant pleaded non assumpsit, and issue being joined thereon, the parties agreed, under a Judge's order, to submit the following case for the opinion of this Court.

The plaintiff, the Rev. Dr. Spry, was, in the month of August, 1825, duly presented, instituted, and inducted rector of the parish of St. Marylebone, in the county of Middlesex, and from thence hitherto hath been and still is rector thereof, and minister of the new church of that parish, mentioned in the acts of Parliament hereinafter referred to. Several acts of Parliament for the building of churches and chapels in that parish, and for the creation

Before the passing of the stat. 51 Geo. 3, c. 151, the incumbent or minister of the parish of St. Marylebone, (which was a lay rectory), by himself or his curates, performed the duty on all burials in the parish, and received the surplice fees thereon, as part of the profits of the living. By that act, the vestry of the parish were empowered to provide

an additional cemetery for the parish, and erect a chapel thereon; and by sect. 41, the lay rector was empowered to appoint a *burying minister*, to officiate in burying the dead in the said cemetery; a *reader* to perform divine service, and preach in the chapel, and (if it should seem right to the vestry) another minister to be *preacher* in the chapel; such *reader* and *preacher* to receive for their salaries such sums as the vestry should appoint. By sect. 89, nothing therein contained was to lessen or alter the title of the lay rector, or the person for the time being entitled to the rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto. By a subsequent act, 1 & 2 Geo. 4, c. 21, (for effectuating the building of four district churches within the parish), it was enacted that the parish should remain and be one entire and undivided parish for all ecclesiastical and civil purposes: and the plaintiff was subsequently appointed rector of the parish. By the 6 Geo. 4, c. 124, (whereby the four districts were made district *rectories* for certain purposes), the district rectors were empowered (sect. 6) to solemnize marriages and baptisms, and take all fees for the same; but (by sect. 9) nothing therein contained was to alter or affect the law respecting burials or burial fees within the parish.

In 1824, W. was presented by the Crown (in whose hands the lay rectory then was) to the chapel built under the provisions of the 51 Geo. 3, c. 151, and thenceforth performed all the burials there, and received the burial fees, which he paid over to the plaintiff, the rector, until the year 1839; when the defendant, by direction of the vestry, received and retained them:—*Held*, that the plaintiff was entitled to recover the amount of such fees; in an action for money had and received.

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of a select vestry therein, have been passed, and upon the construction of the acts hereinafter mentioned the present question arises.

By the 85 Geo. 3, c. 73, the vestrymen are appointed.

By the stat. 51 Geo. 3, c. 151, intituled "An act to enable the vestrymen of the parish of St. Marylebone, in the county of Middlesex, to build a new parish church and two or more chapels, and for other purposes relating thereto;" after reciting the statutes 10 Geo. 3, c. 112, and 12 Geo. 3, c. 40, and reciting the statute 46 Geo. 3, c. 124, intituled "An Act to enable the vestrymen of the parish of St. Marylebone, in the county of Middlesex, to provide an additional cemetery or burial-ground for the said parish, and to erect a chapel therein, and also other buildings and conveniences for the residence of a clergyman, clerk, and sexton, and for other purposes relating thereto;" and reciting, that the said vestrymen had, in execution of the said last recited act, purchased a piece of ground, and inclosed the same, to be appropriated for an additional cemetery or burial-ground for the said parish, and erected a chapel therein, but that the said piece of ground had not been built upon, or a residence provided for a clergyman, clerk, or sexton, pursuant to the powers and provisions contained in the said recited acts, or any of them: and reciting, that it was expedient to repeal and consolidate the recited acts: it was enacted, by sect. 1, that the said recited acts be repealed: and by sect. 2, it is enacted, that the vestry appointed by virtue of the statute 35 Geo. 3, c. 73, be empowered to carry that present act into operation.

By sect. 26, the said vestrymen are empowered to build a new parish church, and also two or more chapels, on the ground to be purchased by virtue of that act.

By sect. 29, it is enacted, that the said piece of ground so purchased by the said vestrymen, in pursuance of the 46 Geo. 3, c. 124, shall be vested in the vestrymen, sub-

ject to the provisions of the said act of the 51 Geo. 3, *Esch. of Pleas,*
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By sect. 31, the vestrymen are empowered to build a chapel on the said piece of ground so purchased as aforesaid for a burial-ground for the said parish, and also to build a house thereon for the residence of the minister to be appointed as thereafter mentioned, for the burying of the dead in the said cemetery or burial-ground, and another house for the use of the clerk or sexton.

By sect. 35, Dr. Heslop was declared to be the minister of the said new church, and that the Duke of Portland (then the patron of that living), or the person or persons for the time being entitled to the rectory of the said parish, and to the advowson of the church of the said parish, and having the right of nominating and appointing a minister or ministers to the said old church, should and might, upon every vacancy, appoint a fit person to be minister of the said new church, which person and persons, and his and their successors so to be nominated and appointed, should after such nomination and appointment be ministers successively of such new church, and should have and enjoy such oblations, mortuaries, Easter offerings, glebes, tithes, profits, commodities, and other ecclesiastical dues and duties arising within the said parish, as the present minister ought to have and enjoy, or as any of his predecessors (ministers of the said parish) ought to have had and enjoyed.

By sect. 41, it was enacted, that when the said piece of ground so purchased by the said vestrymen for a cemetery or burial-ground for the said parish, or for erecting a chapel thereon, should be consecrated as aforesaid, the said Duke of Portland, or the person or persons for the time being entitled as aforesaid, should from time to time nominate and appoint a minister of the Church of England, to officiate for life or during pleasure, in burying the dead in the said intended cemetery or burial-ground, and vaults

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underneath the same; and also, that when the said chapel to be erected on the said piece of ground should be finished and completed, and consecrated, the said Duke of Portland, or the person or persons so entitled as aforesaid, should appoint a reader to perform divine service and preach in the said chapel; and the said Duke of Portland, and the person or persons so entitled as aforesaid, was thereby empowered, in case it should seem right to the vestrymen, to appoint another minister to be preacher in the said chapel; and he was thereby empowered to appoint a clerk and sexton, with the consent and approbation of the said vestrymen; and it was thereby further enacted, that the said reader, preacher, clerk, and sexton should have and receive, for their respective salaries, such sum and sums of money yearly as the said vestrymen should think fit to appoint and direct.

By sect. 45, the duties of the ministers of the other chapels to be built are declared, and they are thereby directed to perform all the duties of a minister of the Church of England, except the solemnization of matrimony, and the publication of banns.

By sect. 46, every such last-mentioned minister is to receive such salary as the said vestrymen shall think fit to appoint and direct.

By sect. 49, the said vestrymen are empowered to settle and fix the rates and fees for burial of the dead in the vaults of the said intended new church, and of all and every the chapels to be erected and built in pursuance of that act, and in the said intended cemetery or burial-ground, and in the vaults under the same; and to make rules, orders, and regulations relative to the burials, and for keeping the said new church, chapels, and vaults, and the vaults of the said cemetery or burial-ground, in good and sufficient repair, and from time to time to alter and amend such rates and fees; and to make such other rules, orders, and regulations in and concerning the premises, as

to the said vestrymen should seem reasonable, necessary, and convenient. *Exch. of Pleas, 1840.*

By sect. 50, it is provided, that nothing in that act contained should enable the said vestrymen to reduce the rates or fees to be payable upon every burial in the vaults of the said new church and chapels, and in the said intended cemetery or burial-ground, or in the vaults under the same, to less sums than were then payable, according to the classes or divisions of the said vaults, cemetery, or burial-ground, for burials in the present cemeteries of the said parish; but the same should be due and payable to, and might be demanded and taken by, the person or persons entitled thereto, anything therein contained to the contrary thereof in anywise notwithstanding.

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By sect. 52, the vestry are empowered to let the pews in the said intended new church and chapels, save and except pews to be appropriated to the poor, and to receive the pew-rents.

By sect. 61, the said vestrymen are empowered to make rates for the purposes of the act, not to exceed in the whole the sum of fourpence in the pound on the yearly rent or value of all lands, houses, &c., in the said parish.

By sect. 72, the said vestry are empowered to raise money for the purposes of that act by granting annuities.

By sect. 78, it is enacted, that all monies arising from such fees, rents, rates, or assessments, and all money that might be borrowed by the said vestrymen by the virtue of that act, should be applied towards carrying the several purposes of that act into execution.

By sect. 89, it is provided, that nothing therein contained shall operate to lessen or alter the right or title of the Duke of Portland, or the person or persons for the time being entitled to the said rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto.

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A statute (1 & 2 Geo. 4, c. 21) was passed to enable the vestrymen of the said parish to effectuate the building of four district churches in the said parish, and for other purposes relating thereto; and it was thereby enacted, (sect. 1), that the said parish should remain and be one entire and undivided parish, for all ecclesiastical, civil, and other purposes, save as therein mentioned.

By the stat. 6 Geo. 4, c. 124, intituled "An Act for making the four districts in the parish of St. Marylebone, in the county of Middlesex, district rectories for certain purposes," it is enacted, (sect. 6), that after the time therein mentioned, it shall be lawful for the minister of the said district rectories to publish all banns and solemnize all marriages, and administer baptisms, in the churches of the said respective districts, and to perform all other parochial functions of a minister, in the same manner as the incumbent, minister, or rector of St. Marylebone is now by law empowered to do, and also to take all fees for the same respectively, save and except as thereafter mentioned.

And by sect. 9 of the last-mentioned act, it is enacted, that nothing in that act contained shall be deemed, taken, or construed to alter or in any way affect the law respecting burials to be performed within the parish of St. Marylebone, and the burial fees thereof, as settled and declared by the aforesaid act, or by any other act or law now in force concerning the same.

On the piece of ground stated to have been purchased for a burial-ground in the preamble of the said statute of 51 Geo. 3, the vestrymen of the said parish built a chapel under the provisions of the said act, and the rest of the said ground was converted into a cemetery or burial-ground, under the provisions of the said acts, and that ground was duly consecrated as a burial-ground in the month of May, 1814. The chapel is named "St. John's Chapel, Marylebone;" the cemetery is called "The Burial-ground of St. John's Chapel." Before the passing of the said act of the

51 Geo. 3, c. 151, the incumbent for the time being of the said parish, by himself or his curates, performed the duty upon all burials which took place in the said parish, and received the surplice fees for such burials for his use, and such fees formed part of the profits of that living.

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Under the provisions of the said act, the vestrymen settled the amount to be received as surplice fees for the burial of the dead in the vaults of the parish church and chapels, and in the said cemetery or burial-ground, and the surplice fees paid for burials in the said ground called the "Burial-ground of St. John's Chapel" have been received by the plaintiff and his predecessor, minister of the parish, regularly since the consecration of the said ground, without any claim or objection on the part of the said vestrymen until the 1st of August, 1839, when the defendant, by the direction of the vestrymen and on their behalf, in defiance of notice not to do so from the plaintiff, received the surplice fees for burials of the dead in the said burying-ground.

In the year 1824, his late majesty King George the Fourth, who was then entitled to the rectory of the said parish, and to the advowson of the church of the said parish, having derived title thereto by conveyance from the Duke of Portland, (who at the time of passing of the above-mentioned statute, as mentioned in the said 41st section, was then entitled to the rectory and advowson), duly nominated and appointed the Rev. Thomas Wharton, by letters patent, of which the following is a copy:—

"George the Fourth, by the Grace of God, &c. &c. By virtue of these presents, We do nominate our trusty and well-beloved Thomas Wharton clerk to St. John's Wood Chapel, in the parish of St. Marylebone, in the county of Middlesex, and in your diocese, the same being now void by the death of the Rev. Gilbert Parke, and in our gift, in full right, commanding and requiring you, so far as it relates to you, to admit the said Thomas Wharton to St.

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John's Wood Chapel aforesaid, and to institute him in the same, with all its rights, members, and appurtenances whatsoever thereto belonging, and you do expedite and perform with favour and effect all other things which belong to your pastoral office in this behalf. In witness" &c. And afterwards, in the month of February, 1825, the Bishop of London, within whose diocese the said chapel and burial-ground then were and are, duly licensed the said Thomas Wharton, upon the said nomination, by an instrument of which the following is a copy:—"Nominated to us by His Majesty George the Fourth, Patron thereof, in full right, in preaching the word of God, and in reading the Common Prayer, and performing all other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer; We do, by these presents, authorize you to receive and enjoy all and singular the stipend, profit, and advantage belonging to the said chapel." And the said Thomas Wharton hath from that time to the present read, and preached, and performed divine service in the said chapel, and officiated and performed the burial service at all the burials which have taken place in the said cemetery or burial-ground, since his said nomination and appointment, and since he was so licensed as aforesaid; and the said plaintiff did not at any time, by himself or his curates, in any way officiate at such burials, or any of them, or perform, or assist in performing, the burial service at any of such burials.

The said surplice fees, so received by the defendant, amount to £125, which were demanded by the plaintiff from the defendant before the commencement of this action.

The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover in this action the amount of the surplice fees in question: if so, a judgment by confession is to be entered for the plaintiff for £125

damages: if not, the judgment to be entered for the defendant.

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Kelly, for the plaintiff.—The question is, whether under the circumstances disclosed in this case, the plaintiff, as the rector of the parish of St. Marylebone, is entitled to the burial fees received at the chapel built under the stat. 51 Geo. 3, c. 151. It is found in the case, that ever since the year 1814, when this burial-ground was formed, the rector has received the fees, without any impeachment of his title to them until the last year, when the vestry have for the first time controverted it. By the 41st section of the act, the preacher nominated to the chapel is to have such salary as the vestrymen shall think fit to direct: but there is nothing in the act to give him the burial fees, or to impair the right of the rector thereto. It may perhaps be argued that section 49 includes the fees in question. That section empowers the vestry to settle and fix the rates and fees for burial of the dead in the vaults of the new church and chapel to be built in pursuance of that act, and in the intended cemetery, and the vaults under the same. But that applies only to the fees to be taken in respect of the burial-place itself, not to the surplice fees to be taken by the minister. That is clear from sect. 50, whereby the vestry are precluded from reducing such rates and fees below the sums then payable, according to the classes of the vaults &c., in the existing cemeteries of the parish. Where the legislature intended to take away any of the emoluments of the rector, they have done so by express words; as in the stat. 6 Geo. 4, c. 124, s. 6. And the 9th section of that act expressly provides, that nothing in the act contained shall be construed to alter or affect the existing law respecting burials and burial fees within the parish. Nor does it appear upon the case that the burial fees are claimed by the district rector, or by any other person than the plaintiff. In Gibson's Codex, p. 542, it is stated as established law, that a fee for burial belongs to the minister

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of the pariah in which the deceased heard divine service and received sacraments, notwithstanding the establishment of a chapel of ease within the parish: and reference is made to the case of *Topsal v. Ferrers* (a), as having recognised that right. There is no legal authority for the position, that where there is a chapel of ease within a parish, to which a minister is appointed, who performs the ecclesiastical offices, he can be entitled to any of the fees due to the rector, except by contract with the rector, or by act of Parliament; and there is nothing in these acts of Parliament to give such a title.

Hill, for the defendant.—It is material to consider the state of this parish at the time of the passing of the 51 Geo. 3, c. 151. It was a lay rectory, and there was no vicar or perpetual curate; but only a *minister*, removable at the pleasure of the rector. Then the 41st section gives the patron for the time being the right of nominating a *minister* to officiate in burying the dead in the intended burial-ground; a *reader* to perform divine service and preach in the chapel to be built thereon; and, if it should seem right to the vestry, another minister to be *preacher* in the chapel. No salary is thereby provided for the minister to be appointed for burying the dead; but the reader and preacher are to receive such salaries as the vestry shall appoint. And the only reason for this distinction appears to be, that there are no fees necessarily incident to reading and preaching, whereas the fees incident to the burying of the dead might be considered a sufficient remuneration for the performance of that office. How otherwise could he be remunerated before the chapel was built, and therefore before he could receive any salary as reader or preacher? It may be admitted that the rates and fees mentioned in section 49 are the burial fees payable to the

(a) Hob. 475.

churchwardens for interment: that sufficiently appears from section 71, which gives the vestry a power of borrowing money on the burial fees. It is said, however, that a rector is entitled by law to all ecclesiastical fees accruing within the parish. If so, we are to see, first, what fees do accrue here, and secondly, whether they belong to the plaintiff, who was not made rector until after the stat. 1 & 2 Geo. 4, and then only sub modo. Now it is laid down in all the books, that at common law no fee is demandable for burial of the dead, except by *custom*; and no custom is found or suggested in this case. *Andrews v. Canothorn* (a). Bishop Gibson himself, in the place referred to, says that, "as to the incumbent for burying, the foundation of the fee was voluntary, and the obligation or necessity of paying arises from custom." [Lord Abinger, C. B.—If this were a special verdict, you would be right in saying that no *custom*, strictly so called, is found; but this is a special case, where the question between the parties is, not whether the fee is due by law or custom, but whether the fees which have been received shall be paid to the one party or the other.] Until the stat. 1 & 2 Geo. 4, c. 124, the incumbent was a person who could not have those fees attached to him by custom, being only a minister removable at pleasure; and the statement in the case is no more than this, that such minister has always performed the service, and received the fee. But even supposing a legal custom, before these acts of Parliament, to pay a burial fee, it was only payable in law pro operâ et labore, to the party performing the duty. *Burdeaux v. Dr. Lancaster* (b). There is nothing found in the case upon which the plaintiff can say the fee is payable to him, whoever shall perform the duty; nor is the minister who does perform it appointed by him. According to the doctrine contended for on the other side, the rector of the

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(a) Willes, 536.

(b) Salk. 332; 12 Mod. 171.

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parish ought to receive the fees on marriages celebrated before the registrar, and on the burial of Jews and dissenters in their own burial-grounds. The right and the duty must be correlative; but here the duty is imposed by the act upon the minister appointed thereby, and the plaintiff would have been an intruder in performing it. The minister is in no respect an agent of the rector, nor is this a chapel existing by his license or authority, but created by act of Parliament, which defines the minister's duties. The mere circumstance of the vestry's having received the money does not alter the situation of the parties; *Boyer v. Dodsworth* (a); it remains in the defendant's hands for the use of the party entitled to it, and if Mr. Wharton be entitled, he may sue the defendant at any time within six years.

Kelly, in reply.—Mr. Wharton sets up no claim, and can have no interest; he receives a salary under the statute. Then, as to the other points. It is said the rector has no right except by custom. This is not a special verdict, and if there were any doubt on the case whether it stated a customary payment to the incumbent for the time being, that would be a fit ground for an amendment. It must be taken, however, upon the statement in the case, that he has always received the fees in question. But further, the rector does, by himself or his agents, perform the duty. A *preacher* has been appointed under the 51 Geo. 3, but a *burying minister* has never been appointed: and the only person having a legal right to bury in this cemetery is the rector. There is nothing in the 41st section which can give Mr. Wharton any right to the burial fees; and the case stands just as if that section had never been introduced, and as if this were an ordinary chapel of ease, built within the parish. The minister of

(a) 6 T. R. 681.

the parish is, in contemplation of law, the person who has done the duty; and the fees have accordingly been paid to and always received by him as of right.

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LORD ABINGER, C. B.—I am of opinion that the plaintiff is entitled to the judgment of the Court. The case states specially, although not in that strict form which a special verdict might do, certain facts, sufficient to enable the Court to form a judgment as to the right of the plaintiff to maintain his action. It is stated that he is the rector of the parish, his predecessors having been the regular ministers of the parish: that before the passing of the 51 Geo. 3, as well as since, the plaintiff and his predecessors have received the burial fees within the parish; that he has received fees arising from this very cemetery and burial-ground, and that until of late he has been accustomed to do so. I think that is a sufficient statement, particularly as against a party who has received those fees, of the right to the fees, and that they are not mere gratuities. If they were mere gratuities, not founded on a custom, I should have agreed with Mr. *Hill*, that there would be no right in any party to maintain an action for them; but we are not authorized so to treat them, they being fees stated to have been received before and after the passing of the act, and paid for all burials performed within the parish. I take that to be equivalent to an allegation, that by the custom of the parish, the rector or minister for the time being, whether he have the character of the vicar or the rector, was entitled to all fees and ecclesiastical dues for burial within the whole limits of the parish, with the exception of those fees that were expressly taken from him by the 6th section of the statute of the 1 & 2 Geo. 4, on the division of the parish into district rectories. Subject to that exception, the act of Parliament reserves to him all the ecclesiastical dues, of burials among the rest, which he was entitled to

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before; and the case states, that before this act of Parliament passed, he was entitled to all. The 41st section of the 51 Geo. 3, c. 151, authorizes the appointment of a minister of burials in the new cemetery; but it does not appear that any such minister was appointed, or that the minister actually appointed has taken the fees; nor does the act of Parliament give them to him if he had, for it reserves all his former rights to the rector: and if he had performed the burial service, it appears to me that he would have performed it as the agent of the rector for that purpose. However, we are not bound or called upon to speculate on the case, with a view to the right of the party appointed under the act, because the case does not state that any person was so appointed. It is clear that Mr. Wharton, whose right arises out of his appointment by the King, and institution by the Bishop of London, was not appointed as the burying minister. Then it appears, that no burying minister being so appointed, some person, if not the rector, has buried within this cemetery ever since it was constructed, and has paid over the fees to the plaintiff, until a certain portion of them has accumulated in the hands of the defendant, who refuses to account for them. Surely the plaintiff is *prima facie* entitled to them, unless some one be shewn who has a better title; and we must assume, as Mr. *Kelly* states, for the purpose of maintaining the action, that the fees were earned by somebody who acted under his authority. The case states, that the person receiving them always accounted for them to the rector, until within the last year; and my opinion is, that an account of them should be rendered to him again, unless the defendant shew a better title in some other person. By these acts of Parliament, they are not taken out of the hands of the rector; therefore I think he is entitled to them, and that the judgment of the Court should be entered for the plaintiff for the sum of £125.

GURNEY, B.—By the act of Parliament creating the rector, it appears that the rector was a *minister*, who was appointed to the parish, and that he, as rector, was entitled to the clergyman's dues, in his character of rector or minister; and, among others, that he did receive surplice fees for burials within the parish; and by a subsequent act there is a reservation to him of all those fees which he before had. It is stated in the case, and must be assumed, that before the passing of the act of 51 Geo. 3, the incumbent for the time being of the parish, by himself or his curates, performed the duty on all burials taking place within the parish, and received the surplice fees for his own use, and that those fees formed part of the profits of the living. The act of Parliament afterwards empowers the vestrymen to purchase a piece of land for a cemetery, and to appoint a burying minister: whether they did so or not does not appear on this case. There is a power given also, under certain circumstances, to appoint a reader and preacher, but there is no provision made for or respecting any surplice fees whatever, but provision is made that such reader and preacher shall receive a salary, to be paid by the vestry of the parish. It appears, that under that act of Parliament, the Crown, which had acquired the rights of the Duke of Portland, the lay patron, appointed the minister of the chapel; he, being so nominated, is entitled to a salary, to be paid by the vestrymen of the parish: but there is no title conferred, or intended to be conferred, on him as to the receipt of any of the surplice fees. When district churches have been created, the rights of the minister of the parish are abridged by express words. Marriages have now been transferred to the district churches, and there are surplice fees given to the ministers of those churches; but no surplice fees are given to the minister of St. John's. In this case, therefore, these fees were of right in the incum-

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bent of the parish, whether minister or rector, before these acts of Parliament passed; and that being the case, and there being nothing in the acts of Parliament to take them out of him, they have been received by a person who refuses now to account for them. It would be a very different question if this were an action for a surplice fee against the party; undoubtedly the plaintiff must shew what is his right against that party, so as to enable him to demand the fee; but here they have been received, and not as of right, but to be accounted for to the rector.

ROLFE, B.—Although, in the first part of this argument, I certainly entertained some doubt, I have now arrived at the same conclusion as the rest of the Court. Before the stat. of the 51 Geo. 3, the incumbent for the time being, by himself and his curates, performed the duty on all burials which took place in the parish, and received the surplice fees for each of such burials. I think this amounts in effect to what is contended for, that this had been a customary fee, payable under the name of a surplice fee, to the incumbent for the time being of the parish, by himself or his deputy performing the duty of burial. Then the question is, whether, in consequence of what was enacted in that act, and since its passing, it could be said that it was the duty of the incumbent himself to perform the duty in respect of which that fee was payable. Now though I had at first a doubt upon the subject, on looking more into it, I do not think that that doubt was well founded.

The 41st section of the stat. 51 Geo. 3, contains several provisions: First, "that when the burial-ground is complete, the Duke of Portland, or the person or persons for the time being so entitled as lay rector, shall from time to time nominate and appoint a minister of the Church of England, to officiate for life, or during pleasure, in

burying the dead in the said intended cemetery or burial-ground, and the vaults underneath the same." Now I had conceived (not attending strictly to what appears in the special case) that Mr. Wharton had been appointed under that provision, and I must guard myself from supposing at all to imply what would be my opinion in that case. I do not wish it to be understood as my opinion, that if the Crown, in exercising this power, had appointed a person for life to be a burying minister, under the provision of that section, it is at all clear then that he would not, in spite of the saving clause in this act, have been entitled to the surplice fees, and not the rector. It appears from Gibson's Codex, that the person entitled to surplice burial fees is not the *rector* of the parish, *quà* rector, but the *minister*, whom I take to be the minister performing this duty of burials: and though there be a saving of rights to the minister of this parish, that would be a saving of his rights in the form in which they existed previously by law. But until there is a minister appointed for burying, it appears to me that the rector does make out that he, by himself or his deputies, performs the duty of burying; for until some power is given to some other person to bury in the cemetery of the parish, it is the right of the rector. Until something appears as to the mode in which Mr. Wharton exercises that right, I think we must take it that it is by the license and permission of the plaintiff; and that consequently the plaintiff is entitled to this fee, which he has been immemorially accustomed to receive. It is quite clear that Mr. Wharton was not appointed as burying minister under the 41st section: he was appointed under the subsequent part of the clause, to the chapel, and the license he obtains from the bishop is for reading the Book of Common Prayer. True, it goes on afterwards—"and for performing other ecclesiastical duties;" but that was void, if it was meant thereby that he

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should perform any other ecclesiastical duties than that branch of the section authorized him to perform.

On these grounds, then, that the plaintiff does appear to me, either by himself or his curates, to have performed the duty in respect of which there has been immemorially a surplice fee payable to him and his predecessors, I think he is entitled to our judgment.

Judgment for the plaintiff.

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Declaration in covenant by A., the surviving lessor in a lease for years, granted by A., B., and C., to the defendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term. Plea, that A., B., and C., from the time of making the demise until the death of B., and A. and C. afterwards, had a reversion for a longer term of years, expectant on the lease, and that after B.'s death, and before any breach of covenant, A. and C.

COVENANT.—The declaration stated, that, by indenture dated 5th May, 1812, made between the plaintiff, one John Oxley, since deceased, and one John Ferard, also since deceased, of the one part, and the defendant of the other part, [profert], the plaintiff, Oxley, and Ferard demised to the defendant a certain messuage or dwelling-house and premises, particularly mentioned and described in the said indenture, situate in the county of Middlesex, to hold the same, with the appurtenances, unto the defendant, his executors, &c., from the 25th day of March then last past, for the term of eighteen years and a quarter, wanting ten days, at a certain rent payable by the defendant, as therein mentioned: And the defendant, by the said indenture, did for himself, his executors, &c., covenant and agree (amongst other things) to and with the plaintiff Oxley, and Ferard, their executors, &c. &c. [setting forth a general covenant to repair and leave in repair]. The declaration then averred the death of Oxley on the 27th of December, 1816, and of Ferard on the 9th of January,

assigned such reversion to D., and thenceforward ceased to have any reversion or interest in the demised premises. Replication, that A., B., and C. were not until the death of B., nor were A. and C. afterwards, possessed of the said reversion in the demised premises, in manner and form as alleged in the plea:—*Held* bad, on demurrer, as being a departure from the declaration.

1834; and assigned breaches of the covenant by the defendant, in not repairing, and in leaving the premises out of repair, &c.

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Third plea, that from the time of making the said supposed demise in the declaration mentioned, and until the death of the said John Oxley, the said John Oxley, the plaintiff, and the said John Ferard, were lawfully possessed of a certain reversion of and in the said demised premises, after the determination of the said supposed lease in the declaration mentioned, to wit, a reversion for the residue and remainder of a certain term of thirty-four years and three quarters of a year, commencing from the 29th day of September, 1795, and the plaintiff and the said John Ferard, from the death of the said John Oxley until the assignment hereinafter mentioned, were lawfully possessed of the said reversion; and being so possessed of the said reversion, heretofore, and before any of the said supposed breaches of covenant in the declaration mentioned, and during the said term by the said supposed indenture granted, and before the commencement of this suit, to wit, on the 1st of January, 1820, the said John Ferard and the plaintiff did, by a certain assignment duly made, assign, transfer, and set over unto one T. S. Benson, his executors, &c., the said reversion of and in the said demised premises: By virtue of which said assignment the said T. S. Benson afterwards, to wit, on the day and year aforesaid, became and was possessed of the said reversion of and in the said demised premises, and the said John Ferard and the plaintiff from thenceforward ceased to have any reversion or interest of and in the said demised premises.—Verification.

Replication, that the said John Oxley and the plaintiff and the said John Ferard were not, from the time of the making of the said demise in the declaration mentioned, and until the death of the said John Oxley, nor at any time, possessed

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Special demurrer, assigning for causes, that the replication is double, and attempts to raise two distinct issues: that it attempts to put in issue what is a conclusion of law: that it departs from, and is inconsistent with, the declaration, which alleges a demise to the defendant by Oxley, Ferard, and the plaintiff, of the premises in question; that it attempts to put in issue either an inference of law, or an immaterial issue of fact, in traversing that the said Ferard and the plaintiff were possessed of the reversion after the death of Oxley; because, if the reversion were in Ferard, Oxley, and the plaintiff, on the making of the demise, it is for the plaintiff to shew how it passed away, so as not to vest in Ferard and the plaintiff, after the death of Oxley; and this not being shewn, the legal inference is that it survived to them; and if the reversion was not in Oxley, Ferard, and the plaintiff, on the making of the demise, then it is sufficient to take the traverse on that allegation. That it passes over and admits the only traversable allegation of the plea, viz. that the plaintiff and Ferard, after the death of Oxley and before any of the alleged breaches of covenant, assigned the reversion to another, and thenceforth ceased to be interested in law.—Joinder in demurrer.

The defendant stated also, in the margin of the demurrer, the following additional points:—That the plaintiff is estopped from denying that the reversion incident to the demise was in Oxley, Ferard, and the plaintiff, immediately at and upon the making of the demise: and that the existence of such reversion in Oxley, Ferard, and the plaintiff, is an inference of law from the demise itself.

Cresswell, in support of the demurrer. The replication is bad for the reasons assigned. [Lord Abinger, C. B.—

Surely it is a departure from the declaration; the parties had the reversion until it is shewn how they parted with it; or how can they support the demise?]—The Court then called upon

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E. V. Williams, for the plaintiff.—The real question is, whether the action should be brought in the name of the present plaintiff, or of Benson the assignee. Suppose the three lessors were partners, and had an equitable interest in the term of $34\frac{1}{2}$ years, out of which they carved the lease in question; and afterwards, still having only an equitable estate, they assigned to Benson:—if the action were brought in his name, it would be necessary to state in the declaration that the original lessors were possessed of the term, that they made the lease to the defendant, and afterwards assigned the term: then the defendant would have pleaded that the three had no title to make the demise: and he would not be precluded, as against the assignee, from so pleading. Where assignors have only an equitable interest, the covenants are only in gross. In *Carvick v. Blagrove* (a), (where all the cases on this subject are collected), it was decided that in covenant by assignee of lessor against lessee for rent arrear, an allegation that the lessor was possessed for the remainder of a certain term of years, is material and traversable. *Dallas*, C. J., says, “the lessee is under no engagement to any one who is not the legal assignee.” That case clearly establishes, that as against the assignee of the lessor, it is competent to the lessee to deny the allegation of the estate of the original lessor; because the plaintiff must shew it to have been an *assignable* estate. In *Whitton v. Peacock* (b), a lessor, having then only an equitable estate in a field, demised a portion of it for ninety-nine years: afterwards, having ac-

(a) 1 Brod. & B. 531.

(b) 2 Bing. N. C. 411; 2 Scott, 630.

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quired the legal estate, he demised the residue to the lessee for the same term, by an indenture which recited the former lease, and stipulated for its continuing in force, but provided that no additional rent should be paid: it was held, that the assignee of the reversion could not sue the assignee of the lessee on the covenants in the first lease, on the ground that, the lessor of that lease having only an equitable title, the covenants were covenants in gross, which did not run with the land, or convey any right of action to the assignee of the reversion. [Lord Abinger, C. B.—Can we take notice in a Court of law of the fact that the interest of the lessor was equitable? The lease purports to be granted by a lessor having the legal estate. *Alderson*, B.—The declaration states, in substance, that the parties had a reversion, for it states that they made a lease. How is the Court to know that they had no legal estate? Surely the plaintiff is estopped from disclaiming the legal estate, if the defendant is from denying it?] Suppose such a lease, and that the lessor dies, and then the question arises whether the heir or the executor shall enforce the payment of rent: suppose the executor brings the action, and the defendant pleads a seisin in fee in the testator; could not that plea be traversed? [Lord Abinger, C. B.—Yes; but the executor must shew, not merely that the testator was seised in fee, but that he had a term of years.] The contract raises the implication that he had some title, and it would be enough to shew that it was not a seisin in fee. [Lord Abinger, C. B.—No; such a title must be shewn as would have passed to the executor. There is no presumption in favour of an executor more than of an heir; each must shew his title.] *Carvick v. Blagrove* shews that the lessee is not estopped from saying that the original lessor had no assignable estate; therefore neither is the lessor. So, a covenant with a mortgagor who has assigned his whole estate is in gross

only, and does not run with the land: *Webb v. Russell* (a). The replication is therefore good, since it shews that the surviving lessor, and not the assignee, is entitled to sue upon the covenant.

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Cresswell, *contra*.—The plaintiff relies on the doctrine of estoppel as against the defendant; but it would be strange if the lessor were not equally estopped. The contract between the parties is for a legal estate. [Lord *Abinger*, C. B.—Could the plaintiff have declared, that not being entitled at law, he nevertheless demised to the defendant, and the defendant covenanted?] No—that would be repugnant: he could not say that he had no estate, and yet that he demised an estate. Here, however, the demise is pleaded as an ordinary lease, and on the face of it is not an assignment. It professes to be a demise of a legal estate for so many years, and each party is estopped from disputing that. Being a demise, it imports a reversion in the plaintiff: the replication of no reversion is therefore a departure. *Carvick v. Blagrove* only shews that the tenant is not estopped from disputing that the plaintiff is not assignee; and *Whitton v. Peacock*, that the assignee of the legal estate cannot sue on a lease granted by the owner of the equitable estate only.

LORD ABINGER, C. B.—I will not say that a declaration might not be framed on such a lease, as an assignment, which would support the action as on a personal covenant; nor will I say what might be the effect of shewing the covenant to be personal, by other facts, as by proof that the lessor had an equitable title only: but there is nothing of the kind here; the declaration is upon an ordinary lease, with acts to be done by the lessee at the expiration or sooner determination of it. The plea sets up an assign-

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ment of the reversion expectant on that lease. Then the replication, which alleges that the plaintiff and the other demising parties had no such reversion, is a departure from the declaration. It does not follow that because the assignee cannot sue, the assignor can.

ALDERSON, B.—I am of the same opinion. The declaration imports a giving up to the lessors at the end of the term; which implies a reversion. Mr. *Williams* argues that we are to infer that this was a mere equitable estate. There is nothing from which we can infer that; and if there were, still the estoppel must be mutual.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.

NEWHALL v. HOLT.

Debt for goods sold and delivered and on an account stated. The particulars claimed 9*l.* 17*s.* 6*d.* The defendant pleaded, as to all except two sums of 1*l.* 0*s.* 6*d.* and 8*l.* 17*s.*, *nunquam indebitatus*; as to 1*l.* 0*s.* 6*d.*, payment into Court; and as to 8*l.* 17*s.*, a set-off. Issue on the first and third pleas; the plaintiff took out of Court the money paid in under the second. *Semble*, that upon this record the plaintiff had nothing to prove, and that the only issue was on the defendant.

DEBT for lead sold and delivered, and on an account stated. The particulars claimed the sum of 9*l.* 17*s.* 6*d.* The defendant pleaded as to all the sum demanded, except two sums of 1*l.* 0*s.* 6*d.* and 8*l.* 17*s.*, *nunquam indebitatus*; as to the sum of 1*l.* 0*s.* 6*d.*, payment of that sum into Court; and as to 8*l.* 17*s.*, a set-off. The plaintiff took out of Court the money paid in under the second plea, and joined issue on the other pleas. At the trial before the under-sheriff of Cheshire, the plaintiff (without objection) began, and having proved the delivery of a quantity of lead to the defendant, called a witness (the

In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods.

And (per *Parke*, B.) the defendant's own admission is always evidence against him, though it refers to the matter of a written agreement.

plaintiff's attorney) to prove a conversation between him and the defendant, in which the defendant had admitted that he owed the plaintiff 9*l.* 17*s.* 6*d.* for lead. The witness, however, admitted on cross-examination, that there was an agreement in writing between the parties relating to the lead. It was thereupon objected for the defendant, that this agreement ought to be produced, and that in default thereof the plaintiff must be nonsuited. The under-sheriff refused to nonsuit, and the jury having found a verdict for the plaintiff for 1*l.* 17*s.* 6*d.*, he reserved leave to the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,

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Crompton shewed cause.—The sheriff could not nonsuit in this case, the issue being on the defendant. [*Parke*, B.—The defendant has admitted on the record that 8*l.* 17*s.* remains due, which he claims to overtop by his set-off.] The amount is made material by its being separated from the rest of the demand by the plea; and there is here no general issue with which to distribute the plea of set-off, as in *Cousins v. Paddon* (a). The whole issue, therefore, was on the defendant: the plaintiff had nothing to prove, and it was therefore immaterial that there appeared to be a written agreement.

Busby, contra.—There was an issue joined on the plea of *nunquam indebitatus*: the plaintiff, therefore, had something to prove, and was bound to begin; and the fact that there was an agreement in writing (with which the parol admission was consistent) appearing upon his own case, that was an objection for which he ought to have been nonsuited.

Lord ABINGER, C. B.—The rule must be discharged.

(a) 2 C., M., & R. 547.

Esch. of Pleas, 1840. An account stated may be proved by a parol admission, although the account itself might consist of many writings.

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PABKE, B.—There is an account stated, to which the admission applies. The under-sheriff clearly could not nonsuit, because the defendant admits on the record that he owes the plaintiff 9*l.* 17*s.* 6*d.* But I apprehend also, that if a party states a sum to be due from him, although the debt arise out of a written agreement, it is evidence against him. What a defendant says is always evidence against him, although it may have arisen out of a written agreement (*b*).

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

(*b*) See the next case.

SLATTERIE v. POOLEY (*a*).

A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument: and even though its contents be directly in issue in the cause.

COVENANT.—The declaration stated, that the plaintiff having entered into a certain deed of composition with certain of his creditors, in which reference was made to a certain schedule annexed thereto, containing a list and statement of the debts then due and owing to and from the plaintiff, the defendant, in consideration of the assignment of a certain equitable interest which the plaintiff then had in certain premises, by indenture dated &c., covenanted with the plaintiff to indemnify him against all debts or demands due from the plaintiff to such of his cre-

(*a*) This case was decided in Michaelmas Term, 1840, but is inserted here as relating to the same subject as the last case.

ditors as had not executed the said deed of composition : and alleged as a breach, that the defendant allowed and permitted one James Thomas, a creditor whose debt was entered in the said schedule, but who had not executed the said deed of composition, to bring an action and recover against the plaintiff the amount of his said debt, together with his costs, &c.

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Pleas—first, non est factum; secondly, that the defendant was induced to enter into the said covenant and agreement by the fraud, covin, and misrepresentation of the plaintiff; and thirdly, that the said debt of the said James Thomas, for which the said action was brought against the plaintiff, as in the declaration mentioned, was not included in the said schedule annexed to the said deed of composition; on which issues were joined.

At the trial before *Gurney, B.*, at the Middlesex Sittings in Trinity Term, the composition deed and schedule were produced in evidence for the plaintiff, but the latter not being duly stamped, was rejected: whereupon, for the purpose of proving the third issue, the plaintiff's counsel tendered in evidence a verbal admission by the defendant, that the debt mentioned in the declaration was the same with one entered in the schedule. This evidence was objected to, on the ground that the contents of a written instrument, which was itself inadmissible for want of a proper stamp, could not be proved by parol evidence of any kind: and the learned Judge being of that opinion, the plaintiff was nonsuited.

Erle having obtained a rule nisi for a new trial, on the ground that the evidence was improperly rejected (citing *Earle v. Picken (a)*),

Sir *F. Pollock* and *Warren* shewed cause in Michaelmas

(a) 5 C. & P. 542.

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Term.—This evidence was not receivable. To admit a parol statement of the matter inserted in the schedule in this case, would be in direct violation of a settled principle of the law of evidence, viz. that the contents of a written instrument cannot be proved otherwise than by the instrument itself, unless satisfactory grounds be shewn for its non-production, in which case secondary evidence of its contents is receivable. The cases on this subject are collected in 1 Phill. Evid. 364, (8th edit.). It is established by several authorities (*a*), that the execution of a deed cannot be proved by the admission of a party to it. Here it was proposed to prove the very matter in issue, viz. the contents of the schedule, and that it included the debt in question, merely by the verbal admission of the defendant. *Bloxam v. Elsee* (*b*) is a distinct authority against the reception of such evidence. That was an action by assignees of a bankrupt for the infringement of a patent granted to the bankrupt; and the defendant's counsel having proposed to ask an adverse witness whether he had not heard the bankrupt say, that by a deed between him and one D. an interest in the patent belonged to D., Lord *Tenterden* interposed, saying emphatically—"I am clearly of opinion that no question can be asked as to what the bankrupt has said as to the contents of a written instrument, without the production of the instrument, or an account of its non-production; and I give my opinion distinctly, in order that it may be renewed by a bill of exceptions, or in any other mode the counsel for the defendant may think proper." That ruling does not appear to have been questioned, and no case appears to have been decided the other way, until that of *Earle v. Picken*, where *Park, J.*, certainly laid it down as a general rule of law, that "what a

(*a*) *Abbot v. Plumbe*, 1 Doug. v. *Dunning*, 4 East, 53.
216; *Johnson v. Mason*, 1 Esp. 89; (*b*) Ry. & M. 187; 1 C. & P.
Cunliffe v. Sefton, 2 East, 87; *Call* 588.

party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to anything else." There, however, the admission did not necessarily involve the contents of a written instrument, but only imported that the party to whom it referred had in some form or other made an agreement with the defendant for the purchase of an estate. [*Parke, B.*—Other subsequent cases to the same effect are referred to in *Phillipps on Evidence*, Vol. I., p. 364, and a reason is given for the admissibility of the evidence. In one sense, no doubt, the *best* evidence is the production of the instrument itself; but the question is, whether the admission by the party himself of its contents is not receivable, as affording a presumption of truth, whereas parol evidence of its contents aliunde, without its non-production being first accounted for, leads to a contrary presumption.] The admission of such evidence is of dangerous precedent, since thereby as well the rule which enjoins the calling of the subscribing witness, as also the reading of the instrument itself, is dispensed with. Of the cases cited in the place just referred to, *Sewell v. Stubbs* (a) was anterior to *Bloxam v. Elsee*, and probably gave occasion to Lord *Tenterden's* emphatic expression of his opinion to the contrary. *Doe d. Waithman v. Miles* (b), and *Doe d. Lowden v. Watson* (c), also occurred before *Bloxam v. Elsee*. In *Newman v. Stretch* (d), the declarations of a bankrupt on his return, that he had absented himself to avoid a writ against him, were held sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded. But there the evidence was not necessarily used to prove the contents of the writ. The bankrupt might go away to avoid writs, though none were actually issued against him. But such evidence has in no

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(a) 1 C. & P. 73.

(c) 2 Stark. N. P. 230.

(b) 4 Camp. 475; 1 Stark. N. P.

(d) Moo. & M. 338.

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case been admitted, where the contents of the deed or written instrument *were directly in issue*. This is no doubt a point of great importance, and it is desirable that it should be settled by a distinct decision of the Court.

On a subsequent day, *Erle* and *Busby* appeared to support the rule, but

PARKE, B., said:—The Court do not think it necessary to trouble Mr. *Erle* in support of the rule in this case; as we who heard the argument (my Brother *Alderson*, who is absent, as well as ourselves) entertain no doubt that the defendant's own declarations were admissible in evidence to prove the identity of the debt sued for, with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord *Abinger*, who was not present at the argument, entirely concurs.

The authority of Lord *Tenterden* at *Nisi Prius*, in the case of *Bloxam v. Elsee*, is no doubt to the contrary: but since that case as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate had been conveyed to, or from such person, or that such person filled the character of assignee, which could only be by deed, or the like (see *Dickinson v. Coward* (a)). Many of these cases are collected in the 1st vol. of Messrs. Phillipps & Amos, p. 364: and any one experienced in the conduct of causes at *Nisi Prius*, must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties

(a) 1 B. & Ald. 679.

thrown in the way of almost every trial would be nearly insuperable. *Exch. of Pleas, 1840.*

The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say, that the evidence is admissible.

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Lord ABINGER, C. B., said, he was not present at the argument, but concurred in what was said by *Parke*, B.; and stated that he had always considered it as clear law, that a party's own statements were in all cases *admissible* against himself, whether they corroborate the contents of a written instrument or not.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute (a).

(a) See, besides the authorities referred to in argument, the following cases:—*Burleigh v. Stibbs*, 5 T. R. 465; *Roe d. West v. Davis*, 7 East, 363; *Paul v. Meek*, 2 Y. & J. 116; *Woodward v. Lambert*, 3 Esp. 286; *Singleton v. Barrett*, 2 C. & J. 368; *Gibson v. Coggon*, 2

Camp. 188; *Doe d. Digby v. Steel*, 3 Camp. 115; *Greenway v. Hurdie*, 4 Camp. 42; *Pasmore v. Bonfield*, 1 Stark. N. P. 296; *Alderson v. Clay*, Id. 405; *Harvey v. Kay*, 9 B. & C. 356; *Ashmore v. Hardy*, 7 C. & P. 501.

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RALEIGH and Others, Assignees of LAWRENCE ROSTROW,
JOHN ROSTROW, and JAMES ROSTROW, Bankrupts, v. AR-
KINSON.

Case.—The declaration, by assignees of bankrupts, stated, that the defendant was a commission-agent at Montreal, and that the bankrupts, before their bankruptcy, delivered to him certain goods, which were not to be sold at less than invoice prices; that at the time of the bankruptcy a large quantity of these goods remained in the

defendant's hands unsold; that the plaintiffs, being assignees of the bankrupts, directed the defendant not to sell the goods at less than invoice prices, until he had rendered to them an account of the goods, and the plaintiffs had been enabled to judge, and had determined and given the defendant notice, whether they would redeem the goods without sale or not. Breach, that the defendant, after the bankruptcy, and after he had rendered an account of the goods, sold them at less than the invoice prices, although the defendant, after the rendering of the account, and before the sale, was required by the plaintiffs, and they gave him notice, *to send the goods to England*, and that they would redeem them without sale. The defendant pleaded, that after the bankrupts had caused the goods to be delivered to him, and before and at and after their bankruptcy, and whilst the goods remained unsold in his hands, the defendant, for advances made before the bankruptcy, had a lien upon the goods; that the bankrupts, before their bankruptcy and after the delivery of the goods, in consideration of the advances by the defendant, agreed with the defendant that he should sell the goods at the best market prices, and realize thereon against his said advances; that the defendant, relying upon the authority to him to sell and realize against his said advances, permitted his advances to remain unpaid for a long time, to wit, until and at and after the bankruptcy; that after the bankruptcy, and after the defendant had rendered an account of the goods, and whilst they were unsold, the plaintiffs did not tender or offer to pay the defendant his advances or lien, or to redeem the goods before the defendant should part with them, and the said goods so remaining on hand were then deteriorating and depreciating in price, and the market getting worse; wherefore he the defendant, exercising his best judgment for the estate of the bankrupts, and the plaintiffs as assignees, and to realize his advances, after he was required to send the goods to London to be redeemed, sold the said goods at the best market prices, according to the said authority of the bankrupts to him in that behalf, using his best judgment therein, as he lawfully might: and after giving credit for the proceeds under such sale, there still remained due to the defendant a large sum of his said advances, and the estate of the bankrupts, and the plaintiffs, as assignees, were still indebted in a large amount on account of the advances:—*Held*, first, that the breach did not, by alleging that the plaintiffs gave the defendant notice *to send the goods to England*, render the declaration bad; secondly, that the plea was bad, as it shewed no consideration for any agreement which deprived the bankrupts or the assignees of their right to revoke the authority to the defendant to sell.

CASE.—The first count of the declaration stated, that the defendant, before and at the time of committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is a trader and commission agent, and the trade and business of a commission agent used, exercised, and carried on, and still does use, exercise, and carry on, to wit, at Montreal, in Canada; and thereupon theretofore, and before the bankruptcy of the said L. Rostrow, J. Rostrow, and J. Rostrow, to wit, on the 1st of May, 1835, and on divers other days before that day and the said bankruptcy, they the said L. R., J. R., & J. R., caused to be delivered to the defendant, and the defendant then accepted and received of and from

the said L. R., J. R., & J. R. a large quantity of goods, to wit, of cotton and other goods, of great value, to wit, of the value of £25,000, to be by the defendant as such commission agent sold and disposed of at Montreal aforesaid, for the said L. R., J. R., & J. R., for certain commission and reward to the defendant, *at prices not less than the prices mentioned in the several invoices of the said goods therewith sent, together with the costs and charges due and to become due in respect of the same*; and the defendant then accepted and received the said goods upon the terms and considerations aforesaid. The count then averred that the invoice prices, together with the costs, amounted to 23,272l. 7s. 3d., and alleged, as a breach, that the defendant sold the goods for less than the invoice prices.

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The second count stated, that before and at the time of committing the grievances thereafter next mentioned, the defendant was and still is such trade and commission agent, and the said trade and business of a trader and commission agent used, exercised, and carried on as in the first count mentioned; and the said L. R., J. R., & J. R., before their said bankruptcy, to wit, at the days and times in the first count mentioned, had caused to be delivered to the defendant, and the defendant accepted and received of and from the said L. R., J. R., & J. R., divers goods, to wit, goods of the same quantity, quality, description, and value, as the goods in the first count mentioned, to be by him sold and disposed of upon the same terms and in the same manner as in that count mentioned: That afterwards, and at the time of the bankruptcy of the said L. R., J. R., & J. R., to wit, on the 21st day of January, 1836, a large quantity of the said goods remained in the hands of the defendant unsold and undisposed of; and the plaintiffs, so being assignees as aforesaid, then, to wit, on the day and year last aforesaid, directed the defendant not to sell the said goods so remaining in the hands of the defendant as aforesaid at less

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than invoice prices, until he had rendered an account to the plaintiffs of the goods remaining in his hands which had been consigned to him as aforesaid, and the said plaintiffs had been enabled to judge, and had thereupon determined and given the defendant notice, whether they would redeem the said goods without sale or not: and it thereupon became and was the duty of the defendant, as such commission agent as aforesaid, not to sell or dispose of the said goods so remaining in his hands as aforesaid, at less than invoice prices, before such account had been delivered as aforesaid, and before the defendant had notice of the determination of the plaintiffs, whether they would redeem the goods without sale or not. And the plaintiffs aver, that the invoice prices of the said goods so remaining in the hands of the said defendant at the time of the said bankruptcy as aforesaid, amounted to a large sum, to wit, the sum of £10,000, whereof the defendant then had notice; yet the defendant afterwards, and after the said bankruptcy of the said L. R., J. R., & J. R., and after he had rendered an account of the goods in hand, to wit, on the 1st day of February in the year last aforesaid, and on divers other days and times between that day and the commencement of this suit, not regarding his duty in that behalf as aforesaid, sold and disposed of all the said goods so remaining in his hands at the time of the said bankruptcy as aforesaid, at far less than the invoice prices thereof, to wit, at prices £2000 less than the invoice prices thereof, although the defendant, after the rendering of the said account, and before the sale thereof, and within a reasonable time after the rendering of the said account, to wit, on the 1st day of February, 1836, as aforesaid, was required by the plaintiffs, and the plaintiffs then gave notice to the defendant, *to send the said goods to England, and that the said plaintiffs would redeem them without sale: contrary to his duty as such commission*

agent, and to the great injury of the plaintiffs, as assignees as aforesaid. *Each. of Pleas,*
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The defendant pleaded, as to the second count of the declaration, that after the said L. R., J. R., & J. R. had caused to be delivered to the defendant the said goods as in that count mentioned, to be by him sold and disposed of as in that count mentioned, and before and at the time of, and after the bankruptcy of the said L. R., J. R., & J. R., as in that count mentioned, and whilst the said large quantities of goods remained in the hands of the defendant unsold and undisposed of, he the defendant, for advances before the said L. R., J. R., & J. R. became bankrupts, had a lien upon the said goods, according to the usage of business in that behalf, amounting to a large sum, to wit, £25,000; and the said L. R., J. R., & J. R., before they became bankrupt, and after the delivery of the said goods to the defendant as in the said second count mentioned, to wit, on the 1st day of January, 1836, *in consideration of the said advances by the defendant, agreed with the defendant that he should use his knowledge and judgment of the market, and sell and dispose of the said goods then remaining in the hands of the defendant at the best market prices, having reference to the cost prices and charges of the said goods, and realize thereon against his said advances.* And the defendant saith, that afterwards, relying on the said authority to him to sell and realize against his said advances, he the defendant permitted his said advances, amounting to the said large sum, to wit, of £25,000, to remain unpaid and owing to him for a long space of time, to wit, until and at and after the bankruptcy of the said L. R., J. R., & J. R.; and afterwards, and after the said L. R., J. R., & J. R. became bankrupts as aforesaid, and after he the defendant had rendered the said account of the goods in hand, and whilst the same were in hand unsold, the plaintiffs did not tender or offer to pay the

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defendant his said advances and lien, or redeem the same before the defendant should part with the said goods, and the said goods so remaining on hand were then spoiling and deteriorating, and depreciating in price, and the market for the said goods was getting worse every day, and likely to be lost together; wherefore he the defendant, exercising his best knowledge and judgment for the estate and effects of the said L. R., J. R., & J. R., and for the plaintiffs, assignees as aforesaid, after they became bankrupts as aforesaid, and to realize upon the said goods against the said advances of the defendant thereupon, according to the usage of business in that particular, and the directions of the said L. R., J. R., & J. R. before they became bankrupts, and after he was required to send the goods to London to be redeemed, and under the circumstances as aforesaid, at the said time when &c., sold and disposed of the said remaining goods at the best market prices, having reference and regard to the cost prices and charges thereof, according to the said authority of the said L. R., J. R., & J. R. to the defendant in that behalf given, using his best judgment and information therein in the sale and disposal thereof, as he lawfully might for the cause aforesaid: And after giving credit for the proceeds under such sale, there still remains due to the defendant a large sum of his said advances, to wit, £2000, and the said estate of the said L. R., J. R., & J. R., and the plaintiffs as assignees as aforesaid, since they became bankrupts, are still indebted to the defendant, after credit given for the sale of the whole of the said goods, amounting to a large sum, to wit, £23,000, in the said large amount thereon, for and on account of the advances made as aforesaid, to wit, £2000.—Verification.

Special demurrer, assigning for causes, that the plea affords no answer to the matters contained in the second count; but states as the ground of defence certain transac-

tions with the bankrupts before their bankruptcy, whereas the defendant is charged in the second count with a breach of duty after the bankruptcy, by selling the goods on hand at the time of the bankruptcy, after he had received the express directions of the plaintiffs not to do so, and after any authority given by the bankrupts had been revoked by their bankruptcy, and by the directions given by the plaintiffs, and without waiting until the expiration of a reasonable time for the plaintiffs to redeem: and also for that the said last plea is uncertain, multifarious, and repugnant.—Joinder in demurrer.

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The points marked for argument were as follows:—The plaintiffs contend that the defendant should not have sold the goods after the directions he had received to the contrary, or at least that he ought to have waited a reasonable time to ascertain whether they would redeem or not; and they rely on the special points as stated in the said demurrer.

The defendant contends that the plea is a good answer to the cause of action stated in the second count of the declaration.

The case was argued in Easter Term, by

Wightman, in support of the demurrer.—The original authority given by the bankrupts to the defendant to sell the goods was a revocable authority, which it was competent to the bankrupts, or to their assignees after the bankruptcy, to alter or revoke. If the defendant had made advances to the bankrupts, and in consideration thereof, and of his waiting for the repayment of the advances, they gave him this authority to sell, the case might have been wholly different; but here the advances are made first, and there is no consideration stated for the bankrupts' foregoing any right they had at the time

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they delivered the goods. [*Parke, B.*—There is no doubt the bankrupts might countermand the order to sell the goods, unless there was an authority to sell, coupled with an interest; as if they had given him that authority in consideration of his forbearing to sue them for prior advances.] The order might have become irrevocable, if it had been shewn that there had been some subsequent advance made on the faith of that order; but here there is no consideration whatever shewn for the bankrupts foregoing their right to revoke. The allegation in the plea, that the defendant, relying on the authority to sell, permitted his advances to remain unpaid, states no more than a mere gratuitous act of his own in so doing, and could not affect their rights. [*Parke, B.*—It is perfectly consistent with this plea, that the advances were made long before the authority to sell was given. *Alderson, B.*—All that appears is, that the defendant had a lien on the goods.] Yes: that he was in the situation of a person having goods in his possession on which he had a lien.

Hoggins, contra.—There is ample consideration stated in the plea for the agreement by the bankrupts, that the defendants should sell for the best market prices. But the first question is, whether the second count is good, and it is submitted that it is not. It states that it was the duty of the defendant not to sell the goods at less than invoice prices, before he had rendered an account to the plaintiffs of the goods remaining in his hands, and before the defendant had notice of the determination of the plaintiffs whether they would redeem the goods or not; whereas the breach is, that the plaintiffs gave notice to the defendant to send the goods to England, and that they would redeem them without sale; but that was more than the defendant was bound to do. [*Parke, B.*—The substantial breach is not the omission to send the goods to England, but the

selling them at less than invoice prices, without waiting to see whether the plaintiffs would redeem or not.] The determination and notice are one entire thing; and the determination was one which he was not bound to obey. The notice was coupled with a condition which the plaintiffs had no authority to impose. The effect is the same as if no countermand had been given; the defendant was therefore remitted to the position in which he originally stood with the bankrupts. But, secondly, if the countermand were a good one, the plea is an answer. It states that the defendant had a lien on the goods for advances, and that in consideration of those advances, the bankrupts agreed with the defendant that he should use his best knowledge and judgment of the market, and sell and dispose of the goods at the best market prices, and realize thereon against his advances. Now that amounts to an agreement that he may sell forthwith, to satisfy his advances, and there is ample consideration stated for that agreement, which could not afterwards be revoked. But even if they had the power to countermand, the plaintiffs did so in a way that they were not entitled to do; and as there was no good countermand, the defendant was entitled to sell the goods.

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Wightman, in reply.—The second count is good. It may be admitted that the defendant was not bound to send the goods to England, but what is alleged to have passed was an ample revocation and perfect retractation of the authority to sell at discretion, given by the bankrupts.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—This was an action brought

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by the assignees of a bankrupt, in which they charged the defendant with having been guilty of improper conduct, in selling certain goods received by him from America for the purpose of sale. The plaintiffs state in their declaration, that they had given the defendant notice not to sell under the invoice prices without further order, as they might redeem the goods, and remove them from his custody altogether if they thought proper. To this declaration there was a plea, in which it was stated, that the bankrupts had given the defendant an authority which in fact rescinded the original contract, under which he received the goods, to sell them at a certain price; and that, in consideration of certain advances made by him, he had authority to sell the goods at such prices as he should consider in his judgment was best, and that he sold the goods accordingly. We wished to consider the subject, and having done so, the Court are of opinion that the plea is bad. I entertained a doubt about it at one time, or rather I wished to find some reason that would warrant the plea, and if I could have found a sufficient consideration to justify the defendant, I should have been glad; but after due consideration of the case, I am compelled to concur with the rest of the Court in thinking that there does not appear to be any sufficient consideration for the agreement which the defendant sets up as a defence. There is no doubt that the assignees had the same power and authority to countermand his selling below price as the bankrupts had. The judgment will therefore be for the plaintiffs.

Judgment for the plaintiffs.

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FAIRBURN and Another, Assignees of JONAS EASTWOOD
and ISAAC WOODHEAD, Bankrupts, v. JOHN EASTWOOD.

TROVER for machinery. Pleas, first, not guilty; secondly, that the plaintiffs, assignees as aforesaid, were not possessed as of their own property of the machinery in the declaration mentioned; thirdly, leave and license: on which issues were joined.

At the trial before *Coleridge, J.*, at the last York assizes, it appeared that by indenture of lease, dated 27th April, 1836, the defendant demised to the bankrupts, for a term of fourteen years, a fulling, scribbling, and carding mill, subject to the usual covenants contained in such leases: by one of which, after stating that the machinery in the said mill had been valued at the sum of 363*l.* 7*s.* 6*d.*, it was mutually covenanted, that at the end or other sooner determination of the said term, the said machinery should be again valued by two indifferent persons, one to be chosen by the lessees and another by the lessor; and that if such second valuation should amount to less than the first valuation, the difference should be paid by the lessees to the lessor; but that if it should be greater than the first valuation, then the surplus of such second valuation should be paid by the lessor to the lessees. In June 1839, a fiat in bankruptcy issued against the lessees, under which they were declared bankrupts, and on the 1st of August following the plaintiffs were appointed their assignees. The plaintiffs declined to take to the lease, and subsequently applied to the

The defendant, by indenture, demised to E. & W. a fulling mill, for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor; but if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease, the lessees became bankrupt, and their assignees

declined to take the lease: but they required the defendant to appoint a person to value the machinery, and on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the original valuation. The assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay:—*Held*, that the assignees (having demanded the machinery) were entitled to recover it in trover, and that their remedy was not by an action on the covenants, which had been determined by the bankruptcy, and by their refusal to take the lease.

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defendant to appoint a person to value the machinery and fixtures, which the defendant refused to do. The plaintiffs then appointed a valuer on their part, who valued the machinery at 861*l.*, and notice thereof was given to the defendant. In October 1839, they delivered up possession of the premises to the defendant, the machinery remaining therein, and demanded from him the difference between the first and second valuation, amounting (after certain deductions agreed on at the trial) to the sum of 346*l.* 7*s.*, which the defendant refused to pay. The defendant shortly afterwards advertised the premises and machinery to let; and having been served with a demand of the machinery by the plaintiffs, and refusing either to deliver it up or to pay for it according to the valuation, the present action was brought. None of the machinery claimed in the action was fixed to the freehold, and a great part of it had been placed in the mill by the bankrupts during the demise. It was contended for the defendant, at the trial, that this action of trover could not be maintained, and that the proper remedy was by an action of covenant against the defendant, for not appointing a valuer, or for not paying the difference in amount between the two valuations. The learned Judge reserved this point, and under his direction a verdict was given for the plaintiffs, damages £581, leave being reserved to the defendant to move to enter a nonsuit. In Easter Term, *Alexander* obtained a rule nisi accordingly, citing *Storer v. Hunter* (a); against which

Cresswell (*Hoggins* with him) now shewed cause.—Of the machinery claimed in this action, part having passed to the bankrupts under the lease, and the remainder having been by them purchased and put into the mill, the whole vested in their assignees, who are entitled to recover it in this action of trover against the defendant. The

(a) 3 B. & Cr. 368; 5 D. & R. 240.

term was determined by the assignees refusing to take to the lease, and the landlord thereupon resumed possession. It is said that the plaintiffs ought to have sought their remedy by an action on the defendant's covenants, to appoint a valuer, and to pay according to the valuation. The answer to that argument is, that the covenants were determined by the bankruptcy, and the refusal of the assignees to take to the lease. There is now no covenant in existence respecting this machinery; it remains, therefore, the property of the lessees, and passes on their bankruptcy to their assignees. *Kearsey v. Carstairs* (a) is an express authority to that effect. [Lord Abinger, C. B.—The effect of the statute (b) is to prevent the assignees from being assignees of the term, unless they assent.] Yes: then their rights remain as if there had been no lease at all, and the machinery, being the property of the bankrupts, passes to their assignees. In *Storer v. Hunter*, which is relied upon on the other side, the landlord had resumed possession before the bankruptcy of the tenant; and the bankrupt never had the possession, order, or disposition of the fixtures, but only a qualified right to use them during the term. [*Alderson*, B.—There the assignees never were in possession.] Here the contract is altogether at an end, and therefore the assignees cannot sue in covenant.

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Alexander and Wightman, contra.—The question is, whether the assignees ever had such a property as to maintain trover. That depends, first, on the terms of the lease; secondly, on the operation of the bankrupt law. This is, as in *Storer v. Hunter*, a demise of a *ready furnished mill*. The lessee may add to and improve the subject of the demise, but the lease contemplates that the property in the whole shall revert to the landlord at the end of the term. Therefore it is that there are to be two valuations: therefore also

(a) 6 G. 4, c. 16, s. 75.

(b) 2 B. & Adol. 716.

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there is a covenant by the lessees to insure the whole. The parties have by their contract reduced it from a case of *property* in the tenant, to a mere right of payment under a covenant. Suppose no bankruptcy had intervened, and the lease had expired by effluxion of time, and the tenant had given up possession; if the landlord had refused to appoint a valuer, could the tenant have maintained trover? [Lord Abinger, C. B.—Certainly not.] Or supposing the assignees had taken to the lease, must they not have resorted to the covenant? Then their having elected to give up the benefit of the lease does not alter the rights of the parties. *Kearsey v. Carstairs* only decides, that where the assignees elect to give up the covenant, they cannot avail themselves of it: the Court carefully abstained from deciding anything as to the *property*. It is a voluntary act of waiver by the assignees, and they have no right thereby to put the lessor in a worse position without his assent. The decision in *Storer v. Hunter* therefore applies, and the defendant is entitled to have a nonsuit entered.

LORD ABINGER, C. B.—This appears to me a very clear case. It is admitted that the covenants were determined by the bankruptcy, and the refusal of the assignees to take to the lease; and the case is the same as if the parties had agreed to put an end to the covenants. The utmost the landlord could say is, that he had a right to buy the machinery; but he repudiates that, and wishes to keep the goods without paying for them. No hardship is done to the defendant: he was bound by his covenant to pay for the machinery; he has the offer of it, and he refuses it. The assignees cannot sue upon the covenants; then the question is, whose is the property? Clearly theirs. The case of *Storer v. Hunter* has been misapplied. There the landlord obtained possession under his contract; then the property in the machinery vested in him, and all he had to do was to pay for it, *modo consensu*, under his covenant.

Here the landlord could only obtain them by virtue of the covenant, and that was put an end to before he had possession.

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ALDERSON, B.—I am of the same opinion. It is a fallacy to say that the property in the machinery passes to the lessor the moment it is put in by the lessees. The substance of the contract is, that whatever is put in or changed during the demise, the lessees stipulate to let the lessor have it at the end of the term, he paying for it according to the valuation, subtracting therefrom the difference between its increased value and its value at the commencement of the lease. The lessees, then, are possessed of the machinery, subject to the covenants: they become bankrupts; and thereby, according to the case of *Kearsey v. Carstairs*, the assignees are discharged from the covenants. Then they hold the goods as their own property, discharged from the bankrupts' covenants; they put the landlord into possession, in order that he may exercise his right of buying them; but he refuses to do so. The assignees cannot bring any action of contract, because the defendant makes none with them: they may therefore have an action of trover, in respect of their property remaining in the goods while in his hands. Our decision in this case will not infringe upon the law as laid down in *Storer v. Hunter*. There, by the forfeiture, the lease was put an end to, so as to dispense with the three months' notice which was to have been given for the purpose of a valuation: and it was the same as if it had been stipulated that the landlord should have the property in the machinery at the end or other sooner determination of the lease. Then he took possession, and so the property vested in him. Here the assignees had the possession discharged of the covenants; then, being so in possession, they hand the goods over to the landlord, who refuses to make any contract with them. They are therefore entitled to maintain trover.

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ROLFE, B.—I am of the same opinion. These goods were the property originally of the bankrupts, and therefore of his assignees; and I can find nothing to make the property pass out of them.

Rule discharged.

NELSTROP and Another, Assignees of BODDINGTON,
a Bankrupt, v. SCARISBRICK, Esq.

The stat. 2 & 3 Vict. c. 29, has a retrospective operation, so as to protect the sheriff from liability in respect of a bonâ fide execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the fiat issued, before the passing of the act, but the assignees were not appointed until afterwards.

ASSUMPSIT against the defendant, late sheriff of the county of Lancaster, for money had and received to the use of the plaintiffs as assignees, and on an account stated. Pleas—first, non assumpsit; secondly, that the plaintiffs were not assignees of Boddington; on which issues were joined. At the trial before *Erskine, J.*, at the last assizes at Liverpool, it appeared that on the 12th of July, 1839, the defendant seized certain goods in the possession of Boddington, the bankrupt, under a fieri facias issued upon a judgment entered up against him on a warrant of attorney. The goods were sold on the 15th. On the 18th, a fiat in bankruptcy issued against Boddington, founded on an act of bankruptcy committed on the 12th, (but subsequently to the seizure), and of which the defendant had notice on the 13th. On the 31st, the plaintiffs were appointed assignees. On the 19th of the same July, the stat. 2 & 3 Vict. c. 29, received the royal assent; whereby it is enacted, “that all executions and attachments against the lands and tenements, and goods and chattels, of any bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the persons at whose suit or on whose account such execution or attachment shall have issued, had not at the time of executing or of

levying such execution or attachment, notice of any prior act of bankruptcy by him committed." It was contended for the defendant, that the words of this statute were retrospective, and protected the seizure in question. The learned Judge reserved the point, and under his direction a verdict was given for the plaintiffs, damages 86*l.* 15*s.*, leave being reserved to the defendant to move to enter a verdict for him on the first issue, if the Court should be of opinion that the defendant was protected by the statute.

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Alexander, in Easter Term, obtained a rule accordingly, against which

Wightman now shewed cause.—If this act be construed to have a retrospective operation upon cases where both the seizure and sale of the goods, and the issuing of the fiat, were prior to its passing, many instances may occur in which great injustice may be worked, by the disturbance of rights vested before the passing of the act. In *Gilmore v. Shuler* (a), where an action was brought after the passing of the Statute of Frauds, upon a promise of marriage made before the statute, it was held that the statute had not a retrospective operation upon such a case; it could not take away a right of action already vested. The case of *Edmonds v. Lawley* (b) is an authority to shew that such an unlimited construction ought not to be put upon this statute as is now contended for. There the fiat issued *after* the passing of the act, which was therefore held to apply: and *Parke, B.*, says—"If a fiat had issued, and assignees had been appointed, before the passing of the act, they would have had a vested right to the

(a) 2 Lev. 227; 1 Ventr. 330; 2 Jones, 108.

(b) Ante, p. 285.

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property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right. Perhaps, if the assignees had not been appointed when the act passed, but the fiat had issued before, we should in that case also construe it so as not to defeat the right of the assignees. But with respect to all fiats issued after the new act has come into operation, we think there is no injustice in saying, that the assignees must take the property subject to the new law." And the other Judges also put the case upon the same ground. It is true, that in *Luckin v. Simpson* (a), the Court of Common Pleas, in a case similar in its circumstances to the present, (and where even the appointment of assignees was before the passing of the act), have decided that the statute had a retrospective operation so as to protect the execution; but the case of *Edmonds v. Lawley* was not brought to the notice of the Court, not having been decided until last Hilary Term, whereas *Luckin v. Simpson* was argued in the preceding Michaelmas Term, although judgment was not given until the present term.

Alexander and Cowling, contra, were stopped by the Court.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. Assuming for a moment that we ought to adopt the narrow construction of the act of Parliament which is contended for by Mr. *Wightman*, still we should be entitled to say, on the facts of this case, that there are here no vested rights of the plaintiffs to conflict with the rights of the defendant. The fiat issued on the 18th of July, and the royal assent was given to the act of Parliament on the 19th, but no assignees were appointed until

(a) Trin. T. 1840; 8 Scott.

the 31st ; and if it were to be held that their appointment is necessarily to have a reference back, and to operate from the date of the bankruptcy, great injustice would be worked in many cases. In *Edmonds v. Lawley*, the fiat was issued after the act came into operation, but upon an act of bankruptcy committed before the levy, which was anterior to the passing of the act ; and the Court there held the execution to be valid against the assignees. How could the parties know whether any assignees would be appointed at all ? Their appointment might not have taken place until months after the seizure : and if the effect of their appointment were thus to divest the right of the execution creditor, the injustice would be great indeed. Taking this act of Parliament as it was construed by this Court in *Edmonds v. Lawley*, and limiting its operation to the case where no right actually vested in the assignees before the passing of the act, that case is exactly in point. But I am not disposed to take so limited a view of the subject, as I go the full length of the doctrine laid down by the Court of Common Pleas, in the case which has been cited as having been decided by them this term. I am of opinion that the proper construction of this act is, that in all cases where the execution creditor bonâ fide issues and levies his execution, and a sale of the goods takes place, before any of the proceedings in bankruptcy, that execution and sale are not to be prejudiced by a previous act of bankruptcy, of which he had no notice. I remember well, when the former act of Parliament on this subject, which was the production of Sir Samuel Romilly, was brought in, I assisted him in preparing the bill, and I know that he was much disposed to have the law then settled in the same way as it is now ; for he felt sensibly the inconvenience that would arise from commissioners of bankrupts having the power to divest rights which had been vested before they were endowed with any authority. It was his wish to have remedied this evil, if he thought the public would have gone along with him to

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that extent, and to have established the law then as it is at present; but I know, from private communications with him, that he calculated that the legislature would in time become sensible of the injustice of the system, and that the law would sooner or later be altered in the manner it has been by this statute of 2 & 3 Vict. c. 29. I am of opinion, therefore, that in every case where an execution has been duly issued, and neither *mala fides* nor any knowledge of the fiat of bankruptcy can be shewn to have existed on the part of the execution creditor, the transaction is protected against the bankruptcy and its consequences: and that the doctrine laid down by the Court of Common Pleas is both right in law, and in accordance with the justice of the case. The struggle here, on the part of the plaintiffs, is not to give effect to vested rights, but to divest them. The statute ought to be so construed as not to allow those rights to be taken away from the parties who have lawfully asserted them; and I am glad to find that such has been the determination of the Court of Common Pleas upon the subject.

ALDERSON, B.—I think we are bound by the decision of the Court of Common Pleas, which is expressly in point; independently of which, however, I entirely concur with the principles which have been laid down by my Lord Chief Baron.

ROLFE, B., concurred.

Rule absolute.

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In the Matter of the GLATTON LAND-TAX.

THIS was a rule under the recent stat. 1 & 2 Vict. c. 58, s. 2, calling on the Commissioners of Land-Tax for the Hundred of Norman-cross, in the county of Huntingdon, to appear and maintain, or relinquish, their assessments in the parish of Glatton, of William Margetts, to the land-tax. The affidavit in support of the application stated, that in December, 1824, Mr. Margetts purchased a farm in Holme Fen, in the parish of Holme, in the Hundred of Norman-cross, consisting of about 640 acres; that in the following and each subsequent year the commissioners of land-tax for that hundred had assessed Mr. Margetts for that farm in the sum of 10*l.* 14*s.* 6*d.* for the parish of Holme, and in the sum of 7*l.* 16*s.* 6*d.* for the parish of Glatton, although no part of the land lay in the latter parish. That in 1831, Mr. Margetts brought an action of trespass against the clerk to the commissioners, in consequence of the seizure of his goods for non-payment of the sum of 7*l.* 16*s.* 6*d.* assessed upon him in Glatton, when, having shewn that his land was locally situate in the parish of Holme, he obtained a verdict, which was ultimately confirmed by the Court of Queen's Bench; that notwithstanding such verdict, the commissioners had annually assessed him, but instead of issuing a distress-warrant, had caused his goods to be seized under a *levari facias*, whereby he was wholly without remedy. It further appeared, that the commissioners for the parish of Holme were also commissioners for the parish of Glatton. There was some doubt whether Mr. Margetts was, in point of fact, rated cumulatively for his lands, the commissioners stating in their affidavit, that the assessment in Holme was in respect of one portion of his farm, and that in Glatton for another, although they were unable to point

The stat. 1 & 2 Vict. c. 58, s. 2, which enables this Court, on application by the owner or occupier of lands, to call upon Commissioners of Land-Tax to appear and maintain or relinquish their assessments, in cases where such person has been rated twice for the same land, applies only to cases in which two separate and distinct bodies of Commissioners, acting for different districts, have both assessed the same land, each claiming it to be within their district or division, and not to a case where the land has been rated twice by the same body of commissioners. In the latter case the remedy is by appeal under 38 Geo. 3, c. 5, s. 23.

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out the particular lands assessed in the respective parishes; but for the purpose of the argument it was assumed that he was rated twice for the same lands.

Hill and Gunning shewed cause.—The stat. 1 & 2 Vict. c. 58, on which this rule was obtained, was meant to apply to a case where two conflicting bodies of commissioners, acting for different districts, have assessed a party for the same lands, each claiming it to be within their jurisdiction; and not to a case like the present, where one and the same set of commissioners have rated the occupier twice in respect of the same property. The second section recites, “that in assessing the land-tax, it sometimes happens that disputes arise as to the division, parish, or place, in which, or in aid of which, particular lands, tenements, or hereditaments, are legally liable to be rated, and by reason whereof such lands, &c., are rated in the several assessments made for two or more of such divisions, parishes, or places respectively; and it is expedient to provide a summary remedy for the relief of the owners or occupiers of such lands, &c., from such cumulative charges of the land-tax, and also to provide the means of ascertaining and determining the division, parish, or place in which, or in aid of which, such lands, &c., are legally liable, and ought to be rated, to the land-tax;” and it then enacts, “that upon application to her Majesty’s Court of Exchequer, made by or on behalf of the owner or occupier of any lands, &c., by affidavit or otherwise, shewing that, by reason of some doubt or dispute as to the division, parish, or place, in which or in aid of which such lands, &c., are legally liable to be assessed to the land-tax, the same or any person or persons in respect thereof, have or hath been assessed, rated, or charged to the land-tax in the several assessments made for two or more divisions, parishes, or places, and that such application is not made with a view to delay the payment of the land-tax which may be legally

assessed or charged upon or in respect of such tenements or hereditaments, and that the party by whom and on whose behalf such application is made, is ready to bring into Court, or to pay or dispose of in such manner as the Court may order or direct, the sum or sums assessed or charged by the said several assessments, or either of them, it shall be lawful for the Court to make rules and orders, calling upon the respective commissioners of the land-tax acting for the several divisions, parishes, or places, in or for which the said several assessments shall have been made, to appear and maintain the said assessments, or to relinquish the same respectively, so far as relate to the lands, &c., in question, and in the meantime to stay all proceedings by distress or otherwise against the party assessed or charged in respect of such lands, &c., for the levying or compelling payment of the sum or sums so as aforesaid assessed; and it shall also be lawful for the Court, if it shall think proper, to order the party by whom or on whose behalf such application shall be made, to pay into Court the sum or sums assessed, or any part thereof, to abide the determination of the dispute, and to be disposed of as the Court may direct; and for determining the question or questions in dispute, it shall be lawful for the Court to order the trial of one or more feigned issue or issues upon such point or points as the Court shall think proper, and also to direct who shall be the plaintiff or plaintiffs, and who shall be the defendant or defendants, on such trial, or otherwise to dispose of the question or questions in dispute, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable." The clause then goes on to provide as to the mode of determining the question in dispute. That statute contemplates the case where two distinct bodies of commissioners have assessed a party for the same property. The remedy Mr. Margetts has is by appeal under 38 Geo. 3, c. 5, ss. 8 & 23, which has not been repealed by the recent statute.

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Kelly and Andrews, contra.—This is a case of double assessment for the same property; and all that the statute requires to be shewn, in order to give the Court jurisdiction, is, that the applicant has been assessed in two different parishes or places in respect of the same property. The words of the statute are amply sufficient to include the present case, and unless the Court give Mr. Margetts relief, he will be wholly without remedy, although he is assessed twice for the same lands. [*Parke, B.*—Is there no appeal to the commissioners, if a party be charged too much?] Yes, there may be, where a party is charged *too much*; but in this case these lands ought not to have been assessed at all in the parish of Glatton. The 8th section of 38 Geo. 3, c. 5, provides, that every collector shall give notice of the time appointed by the commissioners for hearing appeals, that all persons who shall think themselves *overrated* may know when and where to appeal. The 23rd section, after providing that, in case of controversies in assessing commissioners, the commissioners concerned are to withdraw, enacts, that all questions and differences which shall arise concerning any of the said rates, duties, and assessments, or the collecting thereof, shall be heard and finally determined by the said commissioners, in such manner as by this act directed, upon complaint thereof made to them by any person or persons thereby aggrieved. That act applies only to overcharges. It cannot be said that Mr. Margetts was aggrieved by an assessment under that act of Parliament, when he has not an acre of land within the parish of Glatton, where he is assessed.

Lord ABINGER, C. B.—I think we have no jurisdiction in this case. The stat. 1 & 2 Vict. c. 58, s. 2, in my opinion, applies to assessments by two different sets of commissioners. In that case the act authorizes us to call upon the commissioners to appear, and maintain or relinquish their respective assessments. But where a party is assessed twice by one set of commissioners, I cannot doubt

that the commissioners have jurisdiction to hear the appeal.

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PARKE, B.—The question is, whether we have power under this act of Parliament to grant this application, and I am of opinion that we have no such power. It appears to me that under the 23rd section of the land-tax act, Mr. Margetts has a power of appeal to the commissioners, as a person aggrieved by the assessment. The act of 1 & 2 Vict. c. 58, s. 2, applies to a case where there have been two separate assessments to the land-tax, made by separate and conflicting bodies of commissioners. It appears to me that our jurisdiction under the act fails. If the land has been twice assessed by one body of commissioners, there must be a remedy by appeal. It is, however, quite enough to say that we have no jurisdiction.

GURNEY, B., concurred.

ROLFE, B.—I am inclined to think that the act only applies to a case where land has been assessed by two distinct bodies of commissioners: for it enables the Court to order an issue to be tried, and to direct who shall be plaintiffs and defendants, as in a case under the Interpleader Act, which seems to imply that there must be two sets of commissioners, each claiming a right to rate the property.

Rule discharged.

Ex parte BLACKHURST.

R. V. RICHARDS applied to the Court that Mr. Blackhurst, an attorney of the Court of Common Pleas at Lancaster, previously to the rule of Easter Term, 6 Will. 4, is not entitled to be admitted in the superior Courts at Westminster, without being examined and giving the usual notices, &c.

A person admitted and practising as an attorney in the

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caster, might be admitted an attorney of this Court, without the examination required by the rules of Easter Term, 6 Will. 4; or, if not, that he should be examined immediately, without going through the form of making the usual affidavits, depositing his articles of clerkship, giving notice, &c. It appeared from the affidavit on which he moved, that the applicant had been admitted and was practising as an attorney of the Common Pleas at Lancaster before the late rules were promulgated. In *Ex parte Parry (a)*, it was held, that an attorney who had been admitted in another Court was entitled to be admitted in this Court as of course, without giving any notice or undergoing any examination. There the attorney, having been originally admitted an attorney of the Court of Great Sessions in Wales, on the abolition of the Welsh judicature was admitted an attorney of this Court and the Court of King's Bench; he had afterwards discontinued practising, and ceased to take out his certificate for some years, but had since been re-admitted an attorney of the Court of King's Bench; and the Court were of opinion that he was clearly entitled to be re-admitted in the Exchequer without examination.—He also cited *Ex parte Yates (b)*.

Lord ABINGER, C. B.—The rule is founded on an act of Parliament, the language of which is too plain to be misunderstood, and which requires a party to be examined before he can be admitted in one of the superior Courts; and the rule cannot be dispensed with, unless the party has been previously admitted an attorney of the superior Courts.

Rule refused.

(a) 1 M. & W. 295.

(b) 2 M. & Scott, 618; 1 Dowl. P. C. 721.

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LAUGHTON v. TAYLOR.

DEBT for goods sold and delivered.—Plea as follows:—
The defendant, by Thomas Sherwood, his attorney, prays judgment of the said writ and declaration, because he says, that before the issuing of the writ in this action, and before the plaintiff's declaring thereupon, to wit, on the 19th day of December, 1839, the plaintiffs, at the borough of Liverpool, in the county of Lancaster, impleaded the defendant in the Borough Court of Liverpool, then and there held before the mayor of the said borough of Liverpool, and thereupon then and there declared against him in the said Court, for the nonpayment of the very same identical debt sought to be recovered in this action, as by the record thereof more fully and at large appears; and the defendant further says, that the parties in this and the said former suit are the same, and not other or different persons, and that the said identical debt accrued to the plaintiff within the jurisdiction of the said Borough Court of Liverpool, to wit, at the borough of Liverpool aforesaid, in the county of Lancaster aforesaid, and before the commencement of the said suit in the said Borough Court of Liverpool, to wit, on the 4th day of December, A. D. 1839; and that the said Borough Court of Liverpool had in every other respect full power and jurisdiction to entertain, hear, and determine, the said last-mentioned suit, to wit, at the borough aforesaid, in the county of Lancaster aforesaid; and the defendant further says, that the said former suit, so commenced and prosecuted against him the defendant by the plaintiffs as aforesaid, is still depending and undetermined; and this the defendant is ready to verify; and therefore he prays judgment of the said writ in this suit, and the declaration thereon founded, now pleaded to, and that the same may be quashed.

The Court of the mayor of the borough of Liverpool is an inferior and not a superior Court; and therefore a plea that there is another action pending for the same cause in that Court, is no answer to an action in the superior Courts.

Special demurrer, assigning the following causes:—

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First, that the pendency of an action in an inferior Court cannot be pleaded to an action in a superior Court; Secondly, that if the defendant relies on the inferior Court being a Court of record, he ought to have averred that it is a Court of record; Thirdly, that it is not sufficient to plead that the matters are within the jurisdiction of an inferior Court, but that the nature of the jurisdiction ought to have been stated, and it ought also to be stated how such Court was established, and how it obtained its jurisdiction, in order that the plaintiffs might take a traverse thereon: Fourthly, that the superior Courts cannot take judicial cognizance of there being such a Court as the Borough Court of Liverpool, and that the plea does not sufficiently inform the Court of the legal existence of such a Court as the said Borough Court; Fifthly, that it ought to be stated whether the Borough Court is the Court of our Lady the Queen, or whose Court it is; Sixthly, that the defendant ought to have stated that he was ready to verify the matter of record by the record, and that the mere reference to the record is not sufficient; Seventhly, that the plea ought to have stated where the action is still depending; Eighthly, that it is not sufficiently shewn that the said Borough Court was properly held before the said mayor, the constitution of the said Court not being averred; Ninthly, that the plea ought to have shewn how the action in the Court below was commenced, whether by levying a plaint, or how otherwise, and that such mode of impleading was according to the custom of the Court; Tenthly, that it is not averred that the Court was holden within the limits of its jurisdiction; Eleventhly, that the name of the mayor is not stated. Joinder in demurrer.

Hoggins, in support of the demurrer.—The plea is bad. In Com. Dig., Abatement, (H. 24), it is said that “it is no plea to a writ in C. B., or other Court of Westminster, that there is another suit pending for the

same cause in an inferior Court, as in London, Norwich, &c." The same point was also decided in *Brinsley v. Gold* (a). So, in *Sparry's Case* (b), it is said, "if a man bring an action of debt in London or Norwich, or in any inferior Court, and afterwards bring an action of debt in the Common Pleas, this suit in the higher Court, which is brought pending the suit by bill in an inferior Court, shall not abate, as appears in 7 Hen. 4, 8 a, and 3 Hen. 6, 15 a, b. So, in *Seers v. Turner* (c), where to an action for assault, battery, and false imprisonment, where the defendant pleaded in abatement the levying of a plaint for the same cause of action in the Marshalsea, which plaint was in due manner removed into the Court of King's Bench by habeas corpus, where it was still depending; the Court overruled the plea, *Holt*, C. J., saying, "a habeas corpus does not move the cause out of the inferior Court, the cause is stayed below; but a plaint pending in an inferior Court is no plea to an action brought in the Courts at Westminster." Another objection to the plea is, that it does not state before whom the Court was held. The act for amending the proceedings and practice of the Court of Passage of the Borough of Liverpool, (4 & 5 W. 4, c. 92), enacts that the Court may be held before the mayor and one bailiff, or before the mayor alone, or two bailiffs only. The plea, therefore, ought to have shewn that the Court was properly constituted so as to have jurisdiction over the cause.

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Godson, contra.—It may be doubtful whether the Borough Court of Liverpool is to be considered as an inferior Court. The act of 4 & 5 Will. 4, c. 92, has been amended by 6 & 7 Will. 4, c. 135; by the second section of which it is enacted, "that no bailiff of the said borough shall henceforth be or form part of the said Court, but that the

(a) 12 Mod. 204.

(b) 5 Co. 61, a.

(c) 2 Ld. Raym. 1102.

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Liverpool, and that in all cases it shall be sufficient to state any pleadings or proceedings to have been had before, or any judgments to have been given by or to have passed by the consideration of, or any Court to have been held before, the mayor of the borough of Liverpool, by the name of the mayor of the borough of Liverpool, without stating his christian or surname, and without noticing any change or changes of the person or persons filling the office of mayor." Thus, though not in the strict sense a superior Court, yet the process and proceedings, as regulated by this act of Parliament, resemble those of a superior rather than an inferior Court. Execution issued out of it may be levied in any part of the kingdom. A cause depending in an inferior Court may be removed to a superior, but from this Court it cannot. It may be compared to the Courts of the counties palatine. In Bacon's Abr., Courts, (D), superior Courts are divided into Courts more principal and Courts less principal. Of the latter description were the Courts of the counties palatine. This may be considered a Court of a similar nature.

Lord ABINGER, C. B.—All that the act of Parliament says, is, that the Court shall no longer be held before the mayor and bailiffs, but before the mayor alone; that does not constitute it a superior Court. There are many acts of Parliament to regulate the proceedings of inferior Courts, but they do not therefore make them more than inferior Courts. With respect to the Courts of the counties palatine, they were the King's Courts.

The other Barons concurred.

Judgment for the plaintiff.

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BELL v. THE HULL and SELBY RAILWAY COMPANY.

THIS was an action on the case, brought in pursuance of an order of his Honour the Vice-Chancellor. The declaration stated, that the plaintiff, before and at the time of the passing of an act of Parliament of the 6 Will. 4, intituled, "An Act for making a Railway from Kingston-upon-Hull to Selby," (6 Will. 4, c. lxxx), had been, and still was, lawfully possessed of and entitled to a certain wharf, situate upon the river Humber; and that the defendants, in the exercise of the powers by the said act granted, so much injured the said wharf, as to render and cause the same to be inconvenient, and wholly unfit and useless for transporting, conveying, landing, shipping, and depositing goods and merchandize from, to, and at the said wharf: yet the defendants did not nor would, at their own expense, cause *another good and sufficient wharf* to be set out and made instead thereof, as convenient for transporting, conveying, landing, shipping, and depositing of goods and merchandize, as the said wharf so injured as aforesaid, or as near thereto as might be.

Pleas—first, not guilty (by statute); secondly, that the plaintiff was not lawfully possessed of the said wharf in the declaration mentioned; on which issues were joined.

communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, &c., and for transporting, &c., of goods and merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low water mark the defendants constructed their railway, (in the line prescribed by the act of Parliament), thereby rendering the communication between the wharf and the river inconvenient and dangerous:—*Held*, that the plaintiff's wharf was thereby *injured* within the meaning of this section, (which was not confined to an injury done *bodily* to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendants, and was not bound to apply for compensation under another section of the act, which empowered a sheriff's jury to assess the sum payable for any future temporary or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act.

Under what circumstances proprietors of the railway, who had parted with their shares in order to become witnesses for the defendants, were competent, *quære*.

By the Hull and Selby Railway Act, 6 Will. 4, c. lxxx, s. 69, it is provided, "that where any part of any carriage, horse, or foot road, railway or tram road, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company shall, at their own expense, before any such road, quay, wharf, slope, or other

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The cause was tried before *Coleridge, J.*, at the last York assizes, when it appeared that the plaintiff was the owner of a wharf adjacent to the river Humber, in the town of Hull. The defendants, in pursuance of the powers granted to them by their act of Parliament, constructed a railroad on the foreshore of the Humber, between the plaintiff's wharf and low water mark. Before the construction of this railway, vessels were able to lie alongside the wharf, and there take in their cargoes; but by the intervention of the railway they were prevented from doing so, and could only be loaded at great inconvenience, and sometimes at risk to the cargoes. Compensation had been awarded to the plaintiff by a jury empannelled under the 26th section of the act (*a*), who took into consideration the value of the land, the increased expense necessary to carry on the business of the wharf, and the damage likely to be done to the goods shipped from the wharf. The plaintiff, however, insisted that he was entitled to have a new wharf constructed for him by the Company, under the 69th section of the act (*b*). No part of his land was

(*a*) Which empowers a jury (summoned and empannelled as therein mentioned) to assess damages in respect of the value of the land taken, "and also the sum of money to be paid by way of satisfaction, either for the damages which shall before that time have been done or sustained as aforesaid; or for the future temporary or perpetual, or for any recurring damages, which may be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said company; which satisfaction or compensation for such damage or loss shall be inquired into and

assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid."

(*b*) Which enacts, "that in all cases in which, in the exercise of any of the powers thereby granted, any part of any carriage, horse, or foot road, railway or tram road, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandise, the said Company shall, at their own expense, before

cut through, unless the foreshore of the river could be considered as belonging to him.

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The defendants called as a witness, at the trial, one James Walker, one of the proprietors incorporated by name in the act of Parliament. He was examined on the voir dire, and stated in substance, that he had 230 shares in the railway; that having been requested to transfer them, for the purpose of being qualified as a witness, he had transferred them to a Mr. Parker: that nothing was said about their being returned, although he believed there was an understanding to that effect: that he considered the return of the shares to depend on Mr. Parker's honour, but that he would have taken proceedings to compel the re-transfer of them. The learned Judge, considering the transfer of the shares to be merely colourable, rejected the witness as being still interested. He also rejected four other witnesses who appeared to stand in nearly similar circumstances with the witness Walker. And his lordship left three questions to the jury: first, whether the defendants had given the plaintiff as good a communication as he had before; secondly, whether he had already received compensation in respect of his present claim; and thirdly, whether the plaintiff was entitled to the foreshore in front of his wharf. The jury found the first two questions in the negative, and the third in the affirmative; and the verdict was thereupon entered for the plaintiff, with nominal damages.

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any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication (as the case may require) to be set out and made instead thereof, as convenient for passengers, cat-

tle, and carriages, and for transporting, conveying, landing, shipping, or depositing of goods or merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be."

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why a nonsuit should not be entered, on two grounds: first, that the 69th section of the act did not, under the circumstances, impose on the defendants the obligation of making a new wharf for the plaintiff, but only of making for him an equally commodious communication to the old wharf: and secondly, that Walker was improperly rejected as a witness. In this term,

Cresswell, Alexander, and Martin, shewed cause.—The plaintiff is clearly entitled to a new wharf, under the 69th section of the act of Parliament; his “communication” has been “injured,” and rendered “inconvenient for the shipping of goods and merchandize,” within the very words of that section. It is not necessary for this purpose that any portion of his soil should have been actually cut through or taken away; it is sufficient, if the access to his wharf has been made either impassable or inconvenient by the construction of the railroad. Secondly, the witness Walker was rightly rejected, as being interested in the result of the suit. Although he had transferred his *legal* interest in his shares, he still retained, under the circumstances admitted by him, an equitable interest in them: the transferee would be a trustee for him, and would have been enjoined by a decree in equity to retransfer the shares to him. But further, it was a matter for the decision of the Judge at Nisi Prius, upon the facts elicited on the voir dire, whether the witness retained an interest in the shares, which rendered him incompetent; and even if he has come to a wrong conclusion upon them, it is a question whether the Court above can review his opinion. [*Alderson, B.*—The point could not be raised by a bill of exceptions, but surely it may on a motion for a new trial. Suppose a Judge at Nisi Prius were to decide that certain facts amounted to a sufficient search for a document, to let in secondary evidence of its contents; if the Court above should think those facts did not constitute a sufficient

search, would it not be competent to them to overrule the decision of the Judge?] But the authorities shew that a deed, executed for such a purpose as this was, is invalid altogether. In *Birch v. Blagrove* (a), a conveyance made to avoid being sheriff of London, was held to be wholly inoperative. *Ward v. Lants* (b) is to the same effect. The party may not, indeed, be competent to set up his own fraud to avoid his own deed; *Doe d. Roberts v. Roberts* (c); but here the objection comes from a third party, against whose interest the colourable deed is used. In *Parker v. Whitby* (d), a person who admitted that he conceived himself bound in honour, though not legally, to contribute to the expenses of a party to the suit, was held nevertheless to be a competent witness for that party; but there clearly was no *interest*, either legal or equitable.

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Sir *W. W. Follett*, *Starkie*, *Baines*, and *R. C. Hildyard*, *contra*.—First, the reasonable construction of the 69th section is, that the word “injured” should be construed with reference to the preceding words, “cut through, raised, sunk, taken,” all of which are applicable only to the case where the property of the party is taken or affected by some *bodily* injury done directly to itself. The general class to which the remedy provided by that section is to apply, is *an intercepted communication*—the previous words, “road, quay, wharf, slope,” are only instances of such communication. Here, the *wharf itself* is not cut through, raised, sunk, or taken; neither is it *injured*, in the sense in which that word is used in this clause, viz. with relation to an injury by some *bodily act*, as it were, done by the thing itself which is the subject of complaint; it is only the *communication to the wharf*, along the foreshore, which is so injured. The plaintiff, therefore, is not entitled to have a new wharf constructed for him, but only to have

(a) Ambl. 264.

(c) 2 B. & Ald. 367.

(b) Prec. in Chan. 182.

(d) Turn. & Russ. 366.

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his intercepted communication thereto restored to its former state of convenience. That which is the subject of restoration, is the thing to which the actual bodily injury is done. The line of this railway is fixed by act of Parliament; and it would be very unreasonable to compel the company to erect a new wharf, where the present wharf is untouched, and the access to it only is affected by the railway. The plaintiff's remedy for the loss sustained thereby is provided by the 26th section, under which he was bound to seek compensation: *Rex v. Pease (a)*, *Rex v. London Dock Company (b)*.

Secondly, the witness was competent, inasmuch as he had, by the instrument of conveyance, divested himself of all interest in the shares, both legal and equitable. The point to be considered is the operation of the instrument in law, not the intention, still less the expectation, of the party in making it. The Court of Chancery would not direct a reconveyance of property transferred for the purpose of making the conveying party a witness, in fraud of a Court of justice. *Hawes v. Leader (c)*, and *Doe d. Roberts v. Roberts*, are clear authorities to shew that this deed was valid, as against the witness, as well in equity as at law.

Cur. adv. vult.

The judgment of the Court was delivered a few days afterwards by

LORD ABINGER, C. B.—In this case the plaintiff declared, that at the passing of an act of Parliament for making a railway from Hull to Selby, he was possessed of a wharf on the river Humber; that the defendants, the proprietors of the railway, so injured this wharf as to ren-

(a) 4 B. & Adol. 30.

(b) 5 Ad. & Ell. 161; 6 Nev. & M. 393

(c) Cro. Jac. 270; Yelv. 196.

der it inconvenient for the landing and shipping of goods, and that they had refused to make and set out for him another wharf instead thereof, as convenient for the landing and shipping of goods as the one so injured. To this declaration the defendant pleaded, first, not guilty (by the statute); secondly, that the plaintiff was not possessed of the wharf as of his own property. On the latter issue, the plaintiff is clearly entitled to a verdict; but the main question in the case arises on the general issue. This point depends on the construction to be put upon the 69th section of the act of Parliament in question, the 6 Will. 4, c. lxxx. It was contended for the defendants, on the argument, that the injury to the wharf which was, under that clause, to be compensated by the erection of a new wharf, must be an injury done by acts *ejusdem generis* with those specifically mentioned in the clause—such as by “cutting through, raising, sinking, or taking away” the wharf itself, and must have reference to some *bodily injury* done directly to the wharf. We think, however, that such is not the right construction of the act. A liberal interpretation ought to be put upon clauses of this kind. The plaintiff’s wharf has been rendered comparatively inaccessible, and its usefulness for the landing and shipping of goods nearly destroyed, by the railroad which now cuts it off from the river: and it would surely be putting a most unreasonably strict construction on the act of Parliament, to say that the wharf is not thereby very considerably injured. The 26th section of the act does not afford the plaintiff the remedy he requires and is entitled to. If the case, therefore, rested here, the plaintiff would, on the construction which we think the act of Parliament ought to receive, be entitled to have the verdict entered for him on the first issue. The next question is, how far the case is altered by the alleged compensation obtained by the plaintiff before the sheriff. That question, however, does not arise on these pleadings. The case would

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have been different, if the defendants had paid a shilling into Court, and pleaded that the plaintiff had sustained no further damage: as it is, there is no issue which raises the question. The last point is as to the rejection of the evidence of certain of the proprietors of the railway. The principle of law relating to this point is clear enough; the only difficulty is its application to the present case. If the witnesses have really parted with all legal and equitable interest, they are competent; otherwise they are not. Now this fact is left in some degree of ambiguity on the notes of the learned Judge. Some of the witnesses appear to have parted with one interest, others with both. Why they should have been tendered as witnesses it is difficult to see, because their evidence does not appear to be capable of throwing any light upon the construction of the act of Parliament. Upon the whole, however, as there appears to be a doubt whether the witnesses, or at least all of them, were properly rejected as incompetent, we think the rule must be absolute for a new trial.

Rule absolute.

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THE EDINBURGH, LEITH, and NEWHAVEN RAILWAY COMPANY V. HEBBLEWHITE.

DEBT for two calls of £2 each, upon forty shares in the above Company, of which the declaration stated the defendant to be the owner and proprietor, the declaration being in the general form given by the act of Parliament, 6 & 7 Will. 4, c. cxxi. s. 50 (a). Pleas—first, that

By the Edinburgh and Leith Railway Act, 6 & 7 Will. 4, c. cxxi, s. 50, it is provided, that in actions by the Company for calls, it shall be suffi-

cient to allege, that the defendant, being a proprietor of so many shares, is indebted to the Company in such sum of money upon such shares belonging to him, whereby a right of action hath accrued to the Company by virtue of this act, without setting out the special matter; and in such action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls, that they were in fact made, and that notice thereof was given according to the act. To a declaration in the general form given by this clause, the defendant pleaded pleas denying notice of the calls pursuant to the act, and concluding with a verification:—*Held*, that the allegation of notice, that being a fact necessary to be proved in order to entitle the plaintiffs to recover, must be taken to be impliedly contained in the declaration, by reference to the act of Parliament; and therefore that the pleas, being in denial of a matter necessarily implied in the declaration, ought to have concluded to the country and not with a verification, and were on that ground bad on special demurrer.

Seemle, that in such case, the plea of not indebted would sufficiently put in issue all the matters required by the act to be proved in support of the action.

By another section of the act, (s. 49), the directors were empowered to make the calls in manner therein mentioned, and to sue for them, in case of nonpayment, by action of debt; or otherwise, in their option, the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the Company: provided, that no advantage should be taken of any such forfeiture, until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the Company within six months after such forfeiture should happen, which declaration should ipso jure be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded, that by reason of having neglected to pay calls on his shares, they were, in pursuance of the act, declared by the directors to be forfeited, and the directors exercised and declared their option, according to the act, that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture:—*Held*, on special demurrer, that the plea was bad, for not shewing that the shares were declared to be forfeited at a general or special meeting of the Company, according to the provisions of the act.

(a) Sect. 50. "In any action or suit brought by the said Company, in the manner hereinafter directed, against any proprietor or proprietors of any share or shares in the said Company, to recover any sum or sums of money due and payable to the said Company, for or by reason of any call or calls made by virtue of this act, it shall be sufficient for the said Company to declare and

allege, that the defendant or defendants, being a proprietor or proprietors of such or so many share or shares in the said Company, is or are indebted to the said Company in such sum or sums of money, upon such or so many share or shares belonging to the defendant, as the case may happen to be, whereby a right of action or suit hath accrued to the said Company, by virtue of

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the defendant was not nor is indebted in manner and form, &c.; secondly, that no notice of the respective calls in the declaration mentioned, or of any part thereof was given in manner and form as required by the said act of Parliament:—verification; thirdly, that the directors did not appoint any time or times or manner for the payment of the said calls, or any of them, nor any bank or bankers at which or to whom the same, or any of them, might or were to be paid, as in and by the said act in that behalf directed:—verification; fourthly, that before the commencement of this suit, to wit, on the 13th of December, 1839, by reason of the defendant, as such proprietor as aforesaid, having neglected and refused to pay his rateable and proportionable share of money called for in respect of the said respective shares, according to the said act of Parliament, being the said calls in the declaration mentioned, for the space of two calendar months and more, theretofore elapsed after the time in that behalf fixed for payment thereof, the said shares in the declaration mentioned were and each of them was, in pursuance of the said provisions of the said act of Parliament in that behalf, declared by the directors of the said Company to be forfeited; and the said directors then exercised and declared their option, according to the said act of Parliament, that the same should be forfeited, and the same respectively, to wit, then became and were forfeited, of which the defendant, to wit, then had due notice, accord-

this act, without setting forth the special matter: and in such action or suit, it shall be only necessary to prove that the defendant or defendants, at the time of making such call or calls, was or were a proprietor or proprietors of some share or shares in the said Company, and that such call or calls was or were in fact made, and that such notice thereof was given as is directed by this act,

without proving the appointment of the directors who made such call or calls, or other matters whatsoever, and the said Company shall thereupon be entitled to recover the said call or calls which shall appear to be due, and the legal interest which shall be due thereon, and the expenses that may be incurred in prosecuting for and recovering the same."

ing to the said act of Parliament and the provisions thereof, and, to wit, then assented thereto and acquiesced in the said forfeiture:—verification; fifthly, that this action was commenced after a certain sale and transfer of the said respective shares theretofore made by the defendant, the then proprietor thereof, without his having paid or discharged divers large sums of money, amounting in the whole to a large sum of money, to wit, £100, which had theretofore, and before such sale and transfer, been duly called for upon the said respective shares, and upon each of which said respective shares there was at the time of such sale and transfer a large sum of money, part of the sum of £100, respectively due, and that such sale and transfer was made after the passing of the act of Parliament in the declaration mentioned, and before the passing of another act of Parliament concerning the said Company, passed the 1st of July, 1839, to wit, on the 1st of September, 1838, whereby, and according to the said first-mentioned act of Parliament, the same shares became and were forfeited; of all of which premises the plaintiffs, to wit, on the said 1st of September, 1838, had notice, and the said forfeiture in this plea mentioned was, to wit, then, in all respects duly ratified and declared, in the manner in the said first-mentioned act of Parliament in that behalf directed:—verification.

Special demurrer to the 2nd, 3rd, 4th, and 5th pleas: assigning as causes of objection to each of them, “that it amounts to the general issue, and ought to have concluded to the country, and is neither a denial, nor a sufficient nor proper confession and avoidance, of any matters in the declaration mentioned, &c. ;” and, in addition, to the 4th and 5th pleas respectively, “that it is an informal and improper denial of the averment in the declaration, that the defendant was the owner and proprietor of shares in the Company, as therein alleged, and that the plea does not state that the said shares were declared to be forfeited at

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Cowling, in support of the demurrer.—All the pleas are bad, as amounting to the general issue, and also as not being either in denial, or in confession and avoidance, of any matter alleged in the declaration. The second plea states in substance, that no notice of the calls was given. But notice is a fact which must be shewn in evidence by the plaintiffs, in support of their case. The statute 6 & 7 Will. 4, c. cxxi, s. 50, gives a general form of declaration for calls; but it is nevertheless a necessary part of the proof on the part of the Company, under the plea of *nunquam indebitatus*, that the several conditions precedent, specified in the 49th section (a), have been con-

(a) Section 49. The said Company shall have power from time to time to make such call or calls of money from the present or any future proprietors, their heirs, &c., according to the amount of their respective interests, shares, and subscriptions already belonging to or subscribed for, or hereafter to belong to or be subscribed for by him, her, or them, for the purposes of this act, as the directors of the Company shall from time to time deem necessary for those purposes, payable on such day or days as shall be fixed by the said directors, due notice of which shall be made to the proprietors by advertisement in one or more of the newspapers published in Edinburgh, giving not less than fourteen days' notice, or by a letter put into the post-office, signed by the secretary or other officer or person or persons appointed by the directors; but so as no call shall exceed the sum of two

pounds for every twenty pounds of the sum or sums so subscribed, and so as no call to that amount be made but at any interval of three calendar months, at least, from the preceding call; which money so called for shall be paid to such bank or bankers, and in such manner, as the said directors shall from time to time appoint and direct for the purposes of this act, and the said calls shall bear interest from and after the periods of payment so fixed until payment; and in case such proprietor or proprietors shall neglect or refuse to pay his, her, or their rateable or proportionable part or share of the said money, to be paid for as aforesaid, and interest thereon, for the space of two calendar months after the time or any of the respective times fixed for payment thereof as aforesaid, then, and in every such case, the same, with interest due thereon, and costs of suit, may be either sued for and

plied with. In the case of *The London and Brighton Railway Company v. Wilson* (a), the defendant sought to plead a similar plea to the present, but the Court refused to allow it, *Tindal*, C. J., saying, that the plea of never indebted called upon the plaintiffs, before they had any right to say such debt was recoverable, to prove the condition precedent as to notice, which the act of Parliament had imposed upon them. The act having expressly dispensed with certain allegations which must otherwise have appeared upon the face of the declaration, of which this as to notice is one, the defendant ought not to put upon the

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recovered by the said Company in the manner after directed, in the Court of Session, or in any competent Court or Courts in Scotland, or in any of his Majesty's Courts of Record at Westminster, or in the Court of King's Bench and Common Pleas at Dublin, as the case may be, or otherwise, in the option of the directors, such proprietor or proprietors neglecting to pay the same shall forfeit all his, her, or their respective share or shares of the said capital stock, or part or parts thereof previously paid, and interest, in the said Company, all which shall go to and be paid for the benefit of the said Company, and all such forfeited share or shares shall or may be sold by private contract or public sale for the most money that can be got for the same; and the said forfeited share or shares shall form part of the capital stock of the said Company: Provided always, that no advantage shall be taken of any forfeiture of any such share or shares, until notice of such intended forfeiture in writing shall have been previously given by the secretary, or other officer, person or

persons, appointed by the directors, to the proprietor or proprietors of such share or shares, by a letter or notice put into the post-office or left at his, her, or their usual or last known place of abode, nor unless the same shall be declared to be forfeited at some meeting of the same Company, general or special, to be held within six calendar months next after such forfeiture shall happen to be made, which declaration shall ipso jure be a forfeiture of the said share or shares, and of all sums paid thereon, and all interest or benefit arising therefrom, and that without the necessity of any process of law to that effect; and in cases of such forfeiture, the same shall be an indemnification to and for every proprietor, so forfeiting all his or her share or shares, and interest as aforesaid, against all or every action or actions, suit or suits to be commenced, or other agreement between such proprietor or proprietors so forfeiting, and the other proprietors."

(a) 6 Bing. N. C. 135.

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record a plea professing to traverse a fact which is not alleged. In an action for goods sold and delivered, it would clearly be a bad plea to say that the goods were not sold or delivered. So here, the material fact in dispute is, whether, under the circumstances, the defendant is indebted for calls; and the prior circumstances on which that fact depends, are in the nature only of inducement. It is difficult to say whether the plea professes to be pleaded in denial, or in confession and avoidance: if in denial, it is bad for concluding with a verification, and not to the country; if in confession and avoidance, it is also bad, because, instead of confessing a right of action, it denies it, by shewing that no debt ever accrued by reason of the want of notice. [Lord Abinger, C.B.—The declaration is not sufficient without the aid of the act of Parliament; then is not the act substantially a part of the declaration? and if so, must it not be taken to have alleged notice? If that be so, then the plea ought to have concluded to the country. But it is submitted, that the performance of the conditions imposed by the statute is matter of *evidence*, which ought not to be traversed by the plea. The same observations apply to the third plea as to the second. The fourth and fifth pleas are bad, inasmuch as they go to shew that the defendant was not a proprietor at the time of action brought, and therefore that no right of action existed against him. The fourth plea is bad also for not averring that the directors exercised the option given them by the 49th section, and declared the shares to be forfeited at a general or special meeting of the Company.

Crompton, contra.—In actions of debt on statute, there is, strictly speaking, no general issue. The pleading rules of Hil. T. 4, Will. 4, tit. "Covenant and Debt," provide, that "the plea of nil debet shall not be allowed in any action;" and "in actions of *debt on simple contract*, other than on bills of exchange and promissory notes, the de-

fendant may plead that he never was indebted in manner and form as in the declaration alleged, and such plea shall have the same operation as the plea of non assumption," &c. "*In other actions of debt*, in which the plea of nil debet has hitherto been allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. It is true, that in the present case, the facts denied by the pleas do not appear on the face of the declaration, but that is by reason of the provisions of the 50th section of the act; and there being no general issue in debt on statute, the defendant is compelled to shew them by plea. It is said the pleas should have concluded to the country. Where there are a direct affirmative and a negative, the plea ought, no doubt, to conclude to the country: Com. Dig. Pleader (E. 32); 2 Saund. 337, n. (1); 1 Saund. 103 a, n. (3). But it is also laid down, that where the defendant selects one out of many averments in a plea, he may traverse that fact, and conclude with a verification. Here, by the general form of declaration allowed by the act, great difficulty is thrown on the defendant: but as the plea discloses matter not before alleged, it properly concludes with a verification. The plea cannot be considered in denial, since it states a fact nowhere averred. [*Alderson*, B.—Is it in confession and avoidance? It does not admit a debt.] It confesses the matter alleged in the declaration, and avoids it by shewing non-performance of the conditions precedent to the right to sue upon the contract. [Lord *Abinger*, C. B.—This is an action of debt founded on the original contract between the parties, viz. to pay upon the calls being duly made. The clause which gives the form of declaration proceeds upon the contract between the parties. Is not this, therefore, debt on simple contract?] The statute does not declare it to be so; and by the 49th section, certain requisites are to be per-

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formed before the right of action accrues at all. Besides, no action of debt at common law would lie, because the parties are partners: it is therefore an action entirely given by statute. The pleadings are like those in an action on a recognizance of bail, where the defendant may plead *no ca. sa.* sued out against the principal, and the plaintiff replies by setting it out. [*Alderson, B.*—Must not the declaration be considered as containing the averments which the 49th section requires to be proved, in order to sustain the action? If so, it would involve in it the fact of notice. But that section says nothing about the place of payment: therefore your third plea may, perhaps, be bad, and the second good.] With regard to the case in the Court of Common Pleas, the Court decided nothing as to the sufficiency of the pleas themselves, but only whether such pleas should be pleaded together. Then as to the fourth plea: that shews new matter, by disclosing the fact that the shares are forfeited, and therefore that the directors have no longer any right to sue for the calls upon them. The 49th section does not warrant any action after any step has been taken towards the forfeiture of the shares. It is said that the plea does not aver that the directors exercised their option as allowed by the 49th section, by declaring the shares forfeited at a general or special meeting: but that is a matter which is peculiarly within their knowledge, and need not, according to the rules of pleading, be averred by the defendant. The plea is sufficient, by stating that the shares were declared to be forfeited according to the act, that the directors exercised their option according to the act, and that the defendant had notice thereof, and acquiesced in the forfeiture.

Cowling, in reply.—The argument on the other side, as to the first point, rests mainly on the supposition that there is now no plea of the general issue in debt on statute:

but it was decided by this Court in *Earl Spencer v. Swanwell* (a), that notwithstanding the new rules, nil debet is still a good plea to debt on a penal statute. [Alderson, B.—That was a plea of nil debet given by statute.] If these pleas amount to a traverse, they ought to conclude to the country: and if the declaration impliedly states notice, then the pleas do amount to a traverse. The defendant ought to have traversed the main averment, of his being indebted. How then are they in confession and avoidance? It is inconsistent to say, by way of avoidance, that there was no notice; because the *confession*, admitting that the defendant was *indebted*, admits that there was notice. If there is a good confession, the avoidance is repugnant to it. The pleas, therefore, are either bad in confession and avoidance, because they avoid repugnantly to their confession; or bad as a traverse, for not concluding to the country.

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Lord ABINGER, C. B.—The Court were much disposed, in the course of the argument, to come to a different conclusion; but, on consideration, we think there must be judgment for the plaintiffs on all the pleas. With respect to the fourth plea, it is clear that the directors have no right both to declare the shares forfeited, and also to sue for the calls; the proviso in the 49th section only allows them an alternative. But the question is, whether it is sufficiently alleged in the plea that the directors have exercised their option of declaring the shares forfeited. On looking closely into the act, it appears to me that there is no binding forfeiture, unless it be declared by the directors at a general or special meeting of the company, within six months. The plea not stating this, which is so distinctly required by the act, does not shew a sufficient defence to the action.

But the second plea has occasioned considerable doubt

(a) 3 M. & W. 154.

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and perplexity in the mind of the Court, principally from a desire to do justice to the defendant, and yet to respect the established rules of pleading. By the rules of pleading, a defendant cannot traverse any matter not alleged or necessarily implied in the declaration. On the other hand, it is equally clear that a plea in denial must conclude to the country. Now here the declaration does not allege notice of the calls, that being rendered unnecessary by the statute; and yet it is a fact material to the maintenance of the action. Then it is contended, that either the plea ought not to traverse a fact not alleged in the declaration; or that, if notice be a matter necessarily implied in the declaration, the plea ought to conclude to the country, and not with a verification. There is certainly great difficulty in reconciling the act of Parliament with the new rules. The fourth rule requires, that in actions of debt, in which the plea of nil debet has been hitherto allowed, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. In this declaration, taken by itself, no matter of fact is alleged, except that the defendant is indebted in a certain sum for calls: but all the matters which are necessary to maintain that allegation are by the act required to be proved. The declaration would be bad at common law, and is only rendered good by the express enactment of the statute. It appears, then, that in order to make the declaration good, the act must be referred to, and it must be taken that the declaration includes all the facts necessary to be proved by the plaintiffs in support of it, and among them the averment of notice to the defendant. The case then falls within the fourth rule, which requires the defendant, in actions of debt other than simple contract, to deny some particular fact alleged in the declaration. If the declaration had contained an averment of notice, that would have been admitted, unless denied by the plea. The result is, that the plea ought to have con-

cluded to the country, and is therefore bad on that special ground. *Exch. of Pleas, 1840.*

The third and fifth pleas are in substance the same as the second and fourth, and it is therefore unnecessary to advert particularly to them.

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ALDERSON, B.—I quite agree. The difficulty in this case has arisen in a great measure from allowing the plea “that the defendant was not nor is indebted” together with the plea denying notice. The averment that the defendant is not indebted must be considered as supplied by denying all those facts which the statute has required to be proved as conditions precedent to the right to recover: but the proper mode of pleading is to traverse the allegation in terms. I cannot suppose, however, that the act intended to preclude the party from pleading specially matter of defence *ex post facto*. If he be a proprietor—if the calls have been made in point of fact—and if notice have been given of them, he is liable to pay, and can have no defence except by matter subsequent; and that, as it seems to me, he may shew by plea.

With respect to the fourth plea, I think it does not contain a sufficient statement to amount to a defence, because it does not shew that the company, at a general meeting, have adopted the act of the directors in forfeiting the shares, which is necessary to make it binding on the company.

GURNEY, B., concurred.

Judgment for the plaintiffs.

Exch. of Pleas,
1840.

HILL v. MARSDEN.

The plaintiff alleged as an excuse for not making profert of a deed, that it was "in the possession of certain persons, to wit, J. B. H. & T. H., who before and at the time of the commencement of the suit, and thence hitherto, have held and still hold the same by agreement theretofore in that behalf made between the plaintiff and the defendant:"

—*Held*, that this was not a sufficient excuse for the want of profert, as it did not allege that the party who had possession of the deed had refused to produce it.

COVENANT on an indenture of lease, for not keeping in repair certain premises and furniture demised by the plaintiff to the defendant, pursuant to the covenant contained therein. The declaration stated that theretofore, to wit, on &c., by a certain indenture then made between the defendant of the one part, and the plaintiff of the other part, which said indenture, sealed with the seal of the defendant, being in the possession of certain persons, to wit, John Brooke Hyde and Thomas Hyde, who before and at the time of the commencement of this suit, and thence hitherto, have held and still hold the same by agreement theretofore in that behalf made between the plaintiff and the defendant, and which said deed, being so in the possession of the said John Brooke Hyde and Thomas Hyde, the plaintiff, before and at the time of the commencement of this suit, has been, and still is, unable to bring the same into Court here, the date whereof is the day and year aforesaid, the defendant did demise, lease, set, and to farm let &c.

Special demurrer, assigning for causes, that the plaintiff had not brought the indenture into Court, nor made any profert thereof, or alleged any sufficient excuse for not producing the same, or for not making such profert, and that the excuse alleged was insufficient and bad; that it was not shewn what were the terms of the agreement, or how the plaintiff was precluded from having, or unable to have possession of the said indenture, or how the said J. B. Hyde and T. Hyde were entitled, under such agreement, to retain the said indenture as against the plaintiff; and that the said declaration does not shew that, under the said agreement, the said indenture is not in the possession of the said J. B. Hyde and T. Hyde, to be delivered over to the plaintiff upon request, or upon the performance of

some act to be done by the plaintiff, and in his power to perform.

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Whateley, in support of the demurrer, was stopped by the Court, who called upon

Cowling to support the declaration.—The excuse alleged is sufficient. It is always a sufficient cause for not making a profert, that the instrument is in the possession of a third person. The question is not whether the party in whose possession it is could be compelled by a subpoena duces tecum to produce it at the trial, but whether the plaintiff is unable to bring the deed into Court; and for that purpose it is enough to shew that it is in the hands of a third party. [*Alderson*, B.—It does not appear from this declaration, that the parties who hold the deed have declined to produce it.] The defendant has the same power of procuring the deed, or of obtaining an inspection or copy of it, as the plaintiff has. The parties are not trustees for the plaintiff alone, and not for another; and when a deed is so in the possession of trustees, profert need not be made. It is a question of fact whether the plaintiffs were unable to produce it, and the defendant might have taken issue upon that. It is enough in the first instance to allege that the deed is in the possession of a third person, and the plaintiff is unable to produce it. An allegation that a deed is lost by time and accident, is a sufficient excuse for the want of profert; and though it afterwards turns up and is found, it may be produced and given in evidence at the trial. It was so held in *Hawley v. Peacock* (a), on the ground that the averment of the loss of the deed related to the time of the plea pleaded, and applied only to the excuse of the profert. [Lord *Abinger*, C. B.—You say, “who hold the same by agreement:” it may be that they hold it as your agents.]

(a) 2 Campb. 557.

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It is admitted that if it had appeared that it was in the hands of the plaintiff's agent or attorney, it would not be enough: but the allegation here is general, that it is in the hands of a third party, which is sufficient. The plea that a deed is lost by time and accident, does not state how lost.

Whateley, contra, cited *Wallis v. Harrison* (a).

LORD ABINGER, C. B.—It is quite a modern practice to plead that a deed is lost by time or accident, and the propriety of permitting it has frequently been doubted. The object of making profert is that the defendant may see the instrument on which the plaintiff relies. He is entitled to that as a matter of right; but here the plaintiff seeks to deprive him of it, by alleging that the indenture is in the hands of a third party, who does not appear to have refused to produce it, but over whom it is said the plaintiff and defendant have an equal control. The plaintiff, however, has no right to cast upon the defendant the burden of applying for the indenture. Suppose the case of landlord and tenant, where only one part of a lease has been executed, and deposited with an attorney for the benefit of both parties, would that circumstance excuse the party from making profert?

ALDERSON, B.—It is laid down in *Dr. Leyfield's Case* (b), that profert ought only to be excused in cases of extreme necessity. Can we say that this is a case of extreme necessity?

Leave to amend on payment of costs, otherwise
Judgment for the defendant.

(a) 4 M. & W. 538.

(b) 10 Rep. 92.

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WILSON and WIFE v. THORPE.

AT the trial of this cause before the sheriff, upon a writ of trial, a verdict was taken for the plaintiff with one shilling damages, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party. The arbitrator having made his award, and having ordered a verdict to be entered for the defendant, that was accordingly done, and judgment signed thereon. A rule having been obtained, calling upon the defendant to shew cause why the award, and the verdict and judgment, should not be set aside,

F. Robinson shewed cause, and contended that the parties had full power to refer upon any terms they chose, and that there was nothing to prevent them from consenting to a verdict being entered. He compared it to the case of a special verdict being taken by consent in an ordinary trial at *Nisi Prius*.

Where, on the trial of a cause before the sheriff, under the Writ of Trial Act, a verdict was by consent taken for the plaintiff, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, the Court set aside the verdict and judgment, though not the award, on the ground that the sheriff was bound to try the cause, and could not delegate his authority to another.

LORD ABINGER, C. B.—The sheriff cannot delegate his authority. He was bound to try the cause under the writ of trial, and had no authority to refer it so as to give power to alter the verdict and judgment. The verdict and judgment must be set aside, but not the award.

ALDERSON, B.—The 18th section of 3 & 4 Will. 4, c. 42, says, that “the sheriff or his deputy, or judge presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at *Nisi Prius*,” but that does not give him all the powers that a judge at *Nisi Prius* has. The sheriff had no authority to give power to another to alter the verdict of the jury. It would be very inconve-

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nient that a sheriff should have power to order a reference of cases sent to be tried before him, when the object of sending cases to be so tried is, that, where they are of a nature so simple and of so small an amount, the parties ought not to be put to the expense of trying them before a judge at Nisi Prius, or to the expense of a reference.

Rule to set aside the verdict and judgment absolute.

JENKIN v. PEACE and Others.

In pleading a conveyance by lease and release, profert must be made of the release.

TRESPASS for breaking and entering certain closes of the plaintiff, and digging, making, and sinking divers mines, pits, and shafts therein, &c.

Plea, that the said closes in which &c., from time &c., have been, and still are, within and parcel of the manor of Aspull; and that one Sir William Gerard, Bart., now deceased, was lord of the said manor, and seised in his demesne as of fee of and in the said manor, and of and in divers tenements respectively situate and being within the said manor, comprising, amongst other things, the said closes in which &c.; and the said Sir William Gerard, being so seised, &c., long before the said first time when, &c., to wit, on the first day of April, 1678, by a certain indenture then made between the said Sir William Gerard, one Richard Gerard, and Thomas Gerard, son and heir apparent of the said Richard Gerard, of the one part, and John Anderton, &c., of the other part, bearing date on the same day and year last aforesaid, and sealed with the seal of the said Sir William Gerard, for and in consideration of five shillings, then therefore paid by the said John Anderton to the said Sir William Gerard, he the said Sir William Gerard did bargain and sell the said several tene-

ments, comprising the said several closes in which &c., with the appurtenances, unto the said John Anderton, his executors, &c., to have and to hold the same, with the appurtenances, unto the said John Anderton, his executors, administrators, and assigns, from the day next before the date thereof, for and during the term of one whole year thence next ensuing, and fully to be completed and ended; by virtue of which indenture, and by force of the statute for transferring uses into possession, the said John Anderton became and was possessed of the said several tenements, with the appurtenances, for the said term so to him thereof granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said Sir William Gerard, his heirs and assigns: and the said Sir William Gerard being so interested as aforesaid, and the said John Anderton being so possessed, afterwards, and long before the said first time when &c., to wit, on the 2nd day of April in the year last aforesaid, by a certain indenture then made between the said Sir William Gerard, the said Richard Gerard, and Thomas Gerard, of the one part, and the said John Anderton of the other part, bearing date the same day and year last aforesaid, and sealed with the respective seals of the said Sir William Gerard, Richard Gerard, and Thomas Gerard, he the said Sir William Gerard, for the considerations therein mentioned, did give, grant, bargain, sell, release, and confirm unto the said John Anderton, his heirs and assigns, all and singular the said several tenements, so comprising the said several closes in which &c., with the appurtenances, saving and except thereout unto the said Richard Gerard and Thomas Gerard, and their heirs, all mines of cannel lying and being within the said several and respective tenements and hereditaments, &c.: to have and to hold all and singular the said several tenements, with the appurtenances, except as aforesaid, unto the said John Anderton, his heirs and

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assigns for ever; and the defendants further say, that all the estate and interest of the said John Anderton of and in the said first-mentioned messuage and tenement, called &c., by divers mesne conveyances thereof, came to and vested in one Samuel Walker, &c.; and the defendants further say, that, after the making of the said last-mentioned indenture, and before the making of the indenture hereinafter next mentioned, to wit, &c., the said Richard Gerard died, leaving the said Thomas Gerard his son and heir him surviving; and that he the said Thomas Gerard, being seised of and in the said manor, and of and in the said mines of cannel, and entitled to the liberties in that behalf aforesaid, after the death of the said Richard Gerard, to wit, on the 5th day of June, in the year of our Lord 1718, by a certain other indenture, &c., &c. [setting forth, in the same manner as before, other deeds of lease and release, whereby the manor, mines, &c., were conveyed by Thomas Gerard to Sir William Gerard, John Gerard, and Alexander Osbaldeston, and Nicholas Starkie, their heirs and assigns for ever.]—The plea then set out other conveyances by lease and release, in similar terms, without profert, and justified the trespasses by the defendants, as the servants of the then owner of the mines.

Special demurrer, assigning for causes, that the defendants have not brought the said several supposed indentures and deeds of lease, and the said several supposed indentures of release, in the said plea mentioned, or any of them, into Court, or made any profert thereof; and because the plaintiff, from the manner in which the said several supposed deeds and indentures are above pleaded, cannot have oyer of the same, so that he might know whether they are or are not the deeds of the said parties therein mentioned, or that the said supposed matters were granted or conveyed therein or passed thereby; and because it does not appear by the said plea, whether the said

supposed indentures or deeds are actually destroyed, or whether they do not still exist, and are only lost or mislaid: and because no excuse is given for the not profert and making profert of the said supposed indentures and deeds, or any of them.—Joinder in demurrer.

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Cowling, in support of the demurrer.—The plea is bad, for not making profert of the deeds of *release* set forth in it. The authorities all shew that profert is necessary in such a case. In Littleton, s. 452, it is said—“And note, every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as to him to whom the release was, *if the tenant hath the release in his hand to plead.*” And again (s. 453)—“In the same manner it is, where a release is made to the tenant for life, or to the tenant in tail, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold; and they shall have as great an advantage of this, *if they can shew it.*” In the last edition of Mr. Serjeant Stephen’s Treatise on Pleading, (p. 470, 4th edit.), the rule is thus stated:—“In pleading a conveyance by lease and release, under the Statute of Uses, it is not necessary to make profert of the *lease*, because it is the statute that gives effect to the bargain and sale for a year, and the deed does not intrinsically establish the title. But in pleading the *release*, it would seem that profert ought to be made, as the same reason does not apply.” The precedents are all in favour of making profert of the release. See 1 Lilly’s Entr. 136; *Johns v. Whitley* (a); *Jeffreson v. Morton* (b).—He also referred to Sanders on Uses, pp. 60 and 63.—The Court here called upon

(a) 3 Wils. 134.

(b) 2 Saund. 11.

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Addison, contrà.—There are undoubtedly authorities to shew that it is necessary to make profert of a release, where it operates intrinsically by itself. [*Alderson*, B.—It is laid down by Lord *Kenyon*, in *Banfill v. Leigh* (a), that profert is not necessary where a conveyance to uses or a feoffment is pleaded.] The cases are collected in 1 Saund. 8 b, where it is said—“Where a person pleads a deed operating under the Statute of Uses, there is no necessity of making a profert: citing *Estoff’s Case* (b), *Earl of Huntingdon v. Mildmay* (c), *Stockman v. Hampton* (d), *Reynel v. Long* (e), *Read v. Brookman* (f), *Eolton v. Bishop of Carlisle* (g). Now a conveyance by lease and release is *one conveyance*: and it is conceded that it is not necessary to make profert of the lease for a year. In *Eolton v. Bishop of Carlisle*, in setting forth a conveyance by lease and release, it was stated that the release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost; with a profert of the residue. On demurrer, this was holden to be good pleading: and *Heath*, J. said—“As this is a conveyance deriving its effect from the Statute of Uses, all that is averred about the deed being destroyed is mere surplusage.” The same learned Judge repeated the same dictum in *Onslow v. Smith* (h), where also the deeds pleaded were a conveyance by lease and release. [*Alderson*, B.—The origin of that rule would seem to be, that a conveyance under the Statute of Uses being to A. to the use of B., B. would not be required to make profert, because A. would have possession of the deed. The reason given in *Reynel v. Long* is, that in such case B. is in by operation of law, and not by the deed.] The same reason is given in *Stockman v. Hampton*.

(a) 8 T. R. 573.

(b) Dy. 277 a.

(c) Cro. Jac. 217.

(d) Cro. Car. 441.

(e) Carth. 315; Sir W. Jones,

377.

(f) 3 T. R. 151.

(g) 2 H. Bl. 262.

(h) 2 Bos. & P. 384.

The release derives all its authority and validity from the previous bargain and sale for a year, which, as is stated in the plea, operates by force of the statute for transferring uses into possession.

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Cowling, in reply.—The rule laid down in the authorities referred to on the other side, is not disputed: but it is contended that the deeds set forth in this plea do not operate under the Statute of Uses. There is no averment, as to the deeds of release, that they do so operate, but only as to the leases for a year, which are mere matter of form, and as to which it is immaterial whether they are seen by the Court or not. No doubt the lease and release constitute one conveyance as to the quantity of estate which passes by them; but not for the purposes of pleading. A party could not allege in pleading, that by a lease and release and fine, the estate passed. These are, and appear on the face of the plea to be, deeds of release operating only at common law. They operate in the same manner, whether it be upon a bargain and sale for a year under the Statute of Uses, or upon a lease at common law. The lease for a year is only to give a legal possession, and create a privity of estate; but whether that arises so, or from actual possession at common law, is immaterial. Suppose it were merely averred that the party was in possession under a lease for one year, and thereupon a release was granted to him, would not profert be necessary? The decision in *Stockman v. Hampton* proceeded on the ground that the party pleading the deed had no right to the possession of it. But here, looking at the release only, who has the right to the deed? Clearly the party who claims title under it. The release operates, because the lease operates under the statute; but the release operates at common law. Here the releasees of Gerard are in at common law; the estate is released directly to them: they are not in "*in the per.*" *Stockman v. Hampton* was the case

Erech. of Pleas, of a covenant to stand seised: there the deed would be in the possession of the covenantors; there, also, the party was in altogether *in the per*. The dictum of *Heath, J.*, in *Bolton v. Bishop of Carlisle*, was unnecessary to the decision of the case, and is not confirmed by the other Judges.

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Cur. adv. vult.

The judgment of the Court was delivered on a later day in the term, by

LORD ABINGER, C. B.—The question which the Court reserved for its consideration is, whether this special demurrer, for want of profert of the deeds of release mentioned in the defendant's plea, can be supported; and, after consideration, we are of that opinion. The rule is laid down in *Dr. Leyfield's case (a)*, that "if he who is party or privy in estate or interest, or he who justifies in the right of him who is party or privy, pleads a deed, although he who is privy claims parcel of the original estate, yet he ought to shew the original deed to the Court; and the reason that deeds, being so pleaded, shall be shewn to the Court, is, that to every deed two things are requisite and necessary: the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the Judges of the law; the other concerns matters of fact, sc. if it be sealed and delivered as a deed, and the trial thereof belongs to the country; and therefore every deed ought to approve itself, and to be proved by others: approve itself to the satisfaction of the Court in three manners: 1st, as to the composition of the words, to be sufficient in law, and the Court shall judge that; 2nd, that it be not rased or interlined in material points or places, and upon that also the Judges in ancient times did judge upon their own view the deed to be void,

(a) 10 Rep. 92.

but of late times have left that to the jury, if the rasing or interlining were before delivery; 3rd, that it may appear to the Court, and the party, if it were upon condition, limitation, or with power of revocation, &c., to the intent that if there be a condition, &c., if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of it."

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The plaintiff contends that these reasons are clearly applicable to the present case. It was, however, contended on the part of the defendant, that the law had recognised certain exceptions to this general rule, and that the present case fell within them.

These exceptions are mentioned by Lord *Kenyon*, in *Banfill v. Leigh* (a), and by Mr. Justice *Heath*, in *Bolton v. Bishop of Carlisle* (b); in the former case Lord *Kenyon* mentions feoffments and conveyances to uses, and in the latter Mr. Justice *Heath* mentions conveyances to uses, as not requiring profert. It is material to inquire, however, on what principles these exceptions depend. Thus, in the case of a feoffment pleaded, profert needs not be made: but the reason for this seems to be, that the estate does not pass by the feoffment, but by the livery and seisin, which Callis, p. 31, calls "the most perfect form of any by which the freehold and inheritance of lands is transferred from one to another;" and he adds, "where a feoffment is made, the lands there pass by the livery, and not by the deed." The shewing, therefore, of the feoffment to the Court, would not enable them to determine the right of the party, as suggested in *Dr. Leyfield's case*. The next exception, and that, in fact, on which the defendants rely, is that of conveyances under the Statute of Uses. And the reason for this seems to be given in *Stockman v. Hampton* (c) viz. that the party pleading has not possession of the deed, nor any means

(a) 8 T. R. 573.

(b) 2 H. Bl. 262.

(c) Cro. Car. 441.

Exch. of Pleas, to obtain it ; and so accords the case of *Gray v. Felder* (a),
 1840. where, in debt on bond assigned by commissioners of
 JENKIN bankrupt, profert was not made, and yet it was held good,
 v. "because," say the Court, "he is in by act of law, and
 PEACE. had no means to obtain the obligation."

These exceptions of deeds operating under the Statute of Uses probably, therefore, arose from the circumstance that such conveyances were in form conveyances to A. to the use of B., and so A., not B., was considered to have the possession of the deed ; and consequently, when B. pleaded it, the Judges did not require him to make profert. Another reason is to be found in some cases, viz. that the party pleading is not in "*in the per*," which is, in fact, only another technical mode of expressing the same thing. If a man is in "*in the per*," he is in by the party executing the deed ; if in "*in the post*," he is in by the party to whom the deed is executed. This appears from Vin. Abridgment, "Feoffment," (A. 4), who states it thus: "In the case of a feoffment at common law, the feoffee is in in the per, scilt. by the feoffor ; but in the case of a feoffment by the statute of 2nd Ric. 3, the feoffees are in in the post, viz. by the first feoffees." In such cases therefore, those to whom the deed is executed are presumed by law to have the possession of the deed, and the others, to whose use they hold, not having the deed, cannot be required, when claiming under it by pleading, to make profert.

This, we think, is the true principle on which these cases were originally decided ; but even if this were not so, and if they depend on the ground stated in some of the cases, that profert is not necessary in any case where the party claiming under the deed is in by operation of law, (which seems by no means a satisfactory reason, seeing that all deeds operate according to the law), yet either of these reasons is sufficient for the determination of the present case. For although the bargains and sales for a year,

(a) Cro. Car. 209.

as stated in these pleadings, are undoubtedly deeds operating by force of the Statute of Uses, and so profert of them would not be required to be made; yet the releases are deeds operating merely at common law, and in favour of the party to whom they are executed, and he is the person who, according to law, must be presumed to have the possession of them. If, therefore, the present defendants claim under them, they must at all events make profert of the release, in conformity with the rules laid down in *Dr. Leyfield's case*. We think, therefore, that the demurrer must be allowed.

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Judgment for the plaintiff.

GREEN and Another, Assignees of ASHLEY, a Bankrupt,
v. KETTLEBY.

THE plaintiffs having brought an action of debt to recover money owing to the bankrupt, had obtained a distringas for the purpose of proceeding to outlawry, and proceedings were accordingly taken. The defendant did not render to the sheriff on the exigent, but before the last proclamation, the defendant, without issuing a writ of supersedeas, entered an appearance in Court. The plaintiffs thereupon directed the sheriff to stay all further proceedings in the outlawry, and having another cause of action on a special contract, commenced an action of assumpsit against the defendant, and applied to his attorney to appear for him, which he refused to do. They then proposed to consolidate the two actions, by changing the first writ of debt into assumpsit, and to include the cause of action in

The plaintiffs having brought an action of debt against the defendant, obtained a distringas and proceeded to outlawry. The defendant did not render to the sheriff on the exigent, but before the last proclamation entered an appearance, but without obtaining a supersedeas. The plaintiffs thereupon stayed all proceedings in the outlawry: but having another cause of

action against the defendant on a special contract, commenced an action of assumpsit against him, and applied to his attorney to appear for him, which the latter refused to do. The plaintiffs then proposed to consolidate the two actions, by changing the first writ in debt into assumpsit, so as to include both causes of action in the latter. This the defendant refused to do, and kept out of the way to avoid being served with the writ. The Court refused to set aside the appearance to the first writ, or to allow that writ to be amended.

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Byles now moved for a rule, calling upon the defendant to shew cause why the appearance entered in the first action should not be set aside, or why the writ issued in the first action should not be amended, by altering it from debt to assumpsit. The plaintiffs are entitled to the expenses incurred by them in the proceedings towards outlawry. The defendant should either have appeared in Court, or issued a writ of supersedeas. In *Peach v. Wadland* (a), a defendant, against whom proceedings to outlawry had been commenced, gave notice to the plaintiff that he had appeared and obtained a supersedeas of the exigent; but on searching at the Compter it was found that there had been no allowance of the supersedeas, and the defendant was returned outlawed; which the Court refused to set aside. At all events, the Court will allow the writ to be amended. It is the practice to do so in cases in which the remedy would otherwise be lost; as when the Statute of Limitations would otherwise be a bar.

PARKE, B.—We cannot accede to this application. The fault rested entirely with the plaintiffs themselves. Their proper course was to have gone on with the proceedings to outlawry. The proclamations require the defendant to appear in the County Court; if he does not appear there, the plaintiffs may go on with the outlawry. Had that been done, the defendant would have been compelled to come to the Court to set aside the outlawry, which we should not have allowed without his paying all the costs incurred. Then, as to amending the writ; this is not a case in which the remedy would otherwise be barred, and therefore is not analogous to the case of the Statute of Limitations. Amendments are allowed in those cases,

(a) Barnes, 319.

because otherwise the statute would operate as a bar to the plaintiff's cause of action. There are only two cases in which a writ is allowed to be amended: one is, where the Statute of Limitations would otherwise be a bar; the other, where there has been a clerical mistake in the writ (a).

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The rest of the Court concurred.

Rule refused.

(a) See *Kirk v. Dolby*, ante, 636.

PAGE v. THOMAS.

ASSUMPSIT by the payee against one of three makers of a joint and several promissory note, with a count upon an account stated. Pleas, first, that the defendant did not make the note; secondly, the Statute of Limitations. At the trial before *Maule, J.*, at the last assizes for the county of Pembroke, the note was produced, and was as follows:—

“Haverfordwest, May 9, 1832.

“Twelve months after date we jointly and severally promise to pay George Page, of Rosemary Farm, yeoman, or order, £100, with lawful interest on the same, at the rate of £5 per cent. per annum, value received.

STEPHEN THOMAS.

T. A. ALLEN.

Witness, JAMES THOMAS.

JOHN JENKINS.”

In an action by the payee against one of three makers of a joint and several promissory note, another of the makers was called as a witness for the plaintiff, and stated on his examination on the voir dire, that the note had been given by the defendant as principal, and that it was signed by himself and the other maker as sureties:—*Held*, that the witness was competent.

The attesting witness having denied his handwriting, the plaintiff, for the purpose of proving the making of the note, called J. Jenkins, one of the makers, who stated on his examination on the voir dire, that the note had been given by the defendant as principal, and was signed by himself and Allen (the other maker) as his sureties, and

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that Allen had since become insolvent. On this statement it was objected that the witness was incompetent; but *Maule, J.*, received the evidence, reserving leave to the defendant to move to enter a nonsuit. The jury found for the plaintiff for £125, principal and interest. There had been a part payment of the latter, which took the case out of the Statute of Limitations. *Evans*, in Easter Term last, obtained a rule to shew cause why a nonsuit should not be entered.

J. Wilson and *E. V. Williams* now shewed cause.—It is clear both on principle and the decided cases, that the witness was competent, as he stands indifferent as to the result of the action. The person ultimately liable is the defendant, whatever collateral remedies there may be in the case. The witness being only surety, in the event of his being compelled to pay the amount of the note, he could recover over against the defendant the amount so paid. The first case on this subject, and the foundation of all the other cases, was that of *Lockhart v. Graham (a)*, where there were three obligors, and the action was brought against one of them only, and the other obligor was allowed to be a witness to prove the execution of the bond by the defendant. That was not a mere *Nisi Prius* decision, but after conference with other Judges. In *York v. Blott (b)*, which was an action on a promissory note made by the defendant and T. S., the plaintiffs called T. S., an uncertificated bankrupt, who proved the defendant's signature, and it was decided, on the authority of *Lockhart v. Graham*, that he was a competent witness. The reason given was, that if the plaintiffs recovered against the defendant, T. S. would be liable to him for contribution; if they failed in this action, they might resort to T. S. for the whole, and then T. S. would be entitled to contribution from the defendant, so that, quæcunque viâ, T. S. stood indifferent. [Lord

(a) 1 Stra. 35.

(b) 5 M. & Selw. 71.

Abinger, C. B.—Have you any case in which a surety has been allowed to be called against the principal? If the principal is compelled to pay, the surety ceases to be liable altogether.] The whole debt must ultimately be paid by the principal, and therefore the witness cannot have any interest whether it is paid immediately or circuitously. [Lord *Abinger*, C. B.—Here, if the plaintiff succeeds, the witness gets scot free.] He must ultimately be scot free, whether he becomes so first or last. In *Blackett v. Weir* (a), which was an action for coals sold and delivered to a steam yacht company, one Gibson was called to prove that the defendant had a share in the concern, and he proved on the voir dire that he himself was also a partner, and his evidence was objected to as interested; but *Bayley*, J., overruled the objection. A rule nisi for a nonsuit having been obtained, the Court of King's Bench, after argument, held that he was a good witness. *Abbott*, C. J., there says: "It is said that the witness had an interest: he had so; but it was his interest to defeat the plaintiff, for in the event of his recovering, the defendant would be entitled to contribution from the witness." *Bayley*, J., says: "To a certain extent he had an interest in obtaining a verdict for the defendant, for having admitted his own liability, he made himself liable to pay a proportion of the costs, as well as the debt, if the plaintiff recovered. The only difficulty arises from his proving a partnership with the defendant; but his testimony would not prove that in any other action; and if the defendant can hereafter make out that he was not a partner, I think that he may perhaps at law, and certainly in equity, recover from the witness all that he is compelled to pay in the action." And *Holroyd*, J., says: "It has been argued, that unless the defendant were fixed with a part, the witness might be liable to pay the whole debt.

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(a) 5 B. & C. 386; 8 D. & R. 142.

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But it appears to me, that the defendant would have a right to recover from the witness, in an action at law for money paid to his use, the whole sum recovered in this action, if he could shew that the witness was originally liable to pay it. That is the ground upon which all actions for contribution proceed." *Littledale, J.*, also puts it on the same ground. In *Browne v. Lee (a)*, one of three co-sureties for the payment of an annuity paid money on account of the annuity, after the bankruptcy of a co-surety; and it was held that the latter was liable to an action for contribution, though he had obtained his certificate, as one surety could not prove the value of the annuity under the commission against his co-surety; but that he could not *at law* be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. [Lord Abinger, C. B.—That was a case of sureties inter se.] So, in the recent case of *Fowler v. Round (b)*, which was covenant on an indenture of lease against the administratrix of the assignee of the lessee, assigning breaches for non-payment of rent and non-repair; to which the defendant pleaded, that, by assignment during the continuance of the lease, the premises were assigned to the intestate and one Smallwood, and that Smallwood was still alive; which assignment was denied by the replication: it was held, that Smallwood was a competent witness for the plaintiff, to prove that he never accepted or acted under the assignment. The objection here taken seems to be, that the witness was interested in getting the debt satisfied in this action; but the same thing must happen where one co-trespasser is a witness for the plaintiff; yet he is competent. In Buller's *Nisi Prius*, 286, it is said, "a particeps criminis may be a witness for the plaintiff, though left out of the declaration for that purpose; yet

(a) 6 B. & Cr. 689; 9 D. & R. 700.

(b) 5 M. & W. 478.

this mightily lessens his credit, especially in trespasses, where satisfaction from one is a discharge for all the rest." [Lord Abinger, C. B.—There is no contribution amongst co-trespassers.] Nor is there here, because the witness is a surety. In no possible case could the defendant sue the witness—the same as in the case of a co-trespasser. [Lord Abinger, C. B.—In the case of a co-trespasser, there is no written evidence of the relation in which he stands.] But the objection equally applies, because when he is called, he must admit on the voir dire that he was a co-trespasser, in order to raise the point. This principle was fully recognised in *Hall v. Curzon (a)*. There a shareholder of a company was admitted to prove that the defendant was also a shareholder, although it was objected that by so doing he would diminish the amount of his own contribution; and Lord Tenterden says, "The case is similar in principle to that of a co-trespasser. The recovery against one of several co-trespassers is a bar to an action against the others. In practice, the co-trespasser is constantly called to prove that he did the act by the command of the defendant." And there is this note to that case by the reporters—"In a plea in abatement, a party who according to the plea ought to be joined, is a competent witness for the plaintiff, but not for the defendant." The interest, therefore, that the witness has that this action should be maintained, is the same that any co-trespasser has, and he has been held competent. The Court are not to consider whether Allen was solvent or not; for if this action failed, and an action were brought by the plaintiff against the witness, and he recovered, the witness might bring an action against the principal, and recover the whole. The case of *Browne v. Lee* was that of a bankrupt, which was stronger. The witness was therefore clearly competent.

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Evans, in support of the rule.—The cases which have been cited as to co-trespassers are distinguishable; for there there is no contract or liability for contribution, in the event of a verdict against one of them. In *Blackett v. Weir*, *Holroyd*, J., says, “But it appears to me that the defendant would have a right to recover from the witness, in an action at law for money paid to his use—” Now, to stop there, would this defendant have a right to recover against this witness? Most certainly not. Then he goes on to add—“the whole sum recovered in this action, if he could shew that the witness was originally liable to pay it.” *York v. Blott* proceeds upon the same reasoning. But here this rule ought to be sustained, on the ground that the witness would free himself from an action by the plaintiff, if he enabled him to recover in this action. Nothing appears on the note as to principal and surety, but all are joint makers; and if the plaintiff failed, and brought an action against the witness, and recovered against him, he would only have his action for contribution against the other two makers for one-third each; and here Allen was shewn to be insolvent. The fact of there being three parties here, distinguishes this case from *York v. Blott*. Suppose these parties to be all jointly liable as joint makers of this note, the witness, by enabling the plaintiff to recover, would free himself, by his evidence, of one-third of the debt.

LORD ABINGER, C. B.—I think this witness may be considered in the same light as an indorser, who is called as a witness in an action against the acceptor, to prove his handwriting. The witness in such a case has a direct interest in making the acceptor pay; but then if he is called upon himself to pay, he has his remedy over against the acceptor: he is presumed to be indifferent upon the subject. I think what Mr. *Williams* says is true, that we must suppress the circumstance of the insolvency of Allen,

in deciding this case. We must treat the case by analogy to actions against the acceptor of a bill of exchange, where the drawer and indorser may be called as witnesses for the plaintiff. This rule must therefore be discharged.

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The rest of the Court concurred.

Rule discharged.

WINGATE v. WAITE.

THIS was an action of trespass brought against the Commissioners of Sewers for the county of Lincoln, acting in and for the hundreds of Kirton and Skirbeck, for distraining the plaintiff's cattle.

The defendant pleaded, first, the general issue, not guilty; secondly, that the commissioners committed the supposed trespasses by virtue of and under a certain commission of sewers of his late Majesty King William the Fourth, amongst others, for the limits of the hundreds of Kirton and Skirbeck, in the county of Lincoln aforesaid, for a certain assessment or tax assessed on the plaintiff, by virtue of the said commission, and according to the purport of the statute of sewers made in the 23 Hen. 8 (a), which said commission was and still is in force; and that the said close in which &c., was within the limits aforesaid, and the jurisdiction of the said commissioners. The plaintiff replied *de injuriâ*, whereupon issue was joined.

The cause came on to be tried before the Lord Chief Baron, at the Lincoln Summer Assizes, 1839, when a ver-

A parish, consisting of two districts, had immemorially been assessed to the repairs of a sea bank (which was necessary for the protection of lands from the sea in both districts), by one assessment, collected by one dyke-reeve. The commissioners of sewers, without any presentment of a jury, appointed two dyke-reeves, one for each district, and made a rate on one district exclusively for the repairs of the sea bank:—*Held*, that the rate was void for want of a presentment, and that the commissioners were

without jurisdiction, and were liable in trespass for the taking of the plaintiff's cattle under a distress warrant issued by them for arrears of such rate.

(a) Cap. 5.

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dict was taken for the plaintiff for 2*l.* 16*s.* 3*d.* damages, with liberty for the defendant to move to enter a nonsuit. In Michaelmas Term, 1839, the Court granted a rule nisi for setting aside the verdict and entering a nonsuit, with directions that the facts should be turned into a special case, which was accordingly agreed upon, and was as follows:—

The defendant was owner and occupier of lands in South Butterwick: the defendant was clerk to the commissioners of sewers for the county of Lincoln, within whose jurisdiction the parish of Butterwick, divided into North and South Butterwick, together with an adjoining district called Butterwick Hundred, lay. The lands of South Butterwick and Butterwick Hundred abut on the sea bank hereinafter mentioned, along the whole length thereof, and lie between the said bank and the district of North Butterwick. The action was brought to try the validity of a rate intitled “a rate or assessment of one shilling an acre, made and granted to Robert Enox, dyke-reeve of Butterwick South and Butterwick Hundred, for every acre of land in Butterwick South and Butterwick Hundred aforesaid, chargeable with and liable with the payment of the dyke-reeve rate, to be charged upon the several owners of the said lands and their respective tenants thereof, to defray the expenses incurred and to be incurred by the said dyke-reeve, in repairing the sea bank extending from the blue stone on the sea bank of Freston to the sea bank in Bennington, and also to defray all and every other expense incurred or to be incurred by the said dyke-reeve, in the execution of the said office, or in relation thereto, for the year ending at Easter, 1836: the said lands and the owners and occupiers being liable by prescription, founded on custom or immemorial usage, to repair the same.” The plaintiff’s cattle, mentioned in the declaration, were distrained for non-payment of the sum assessed upon him by the said rate, which sum had been previously demanded of him. The plaintiff,

before the time of taking the distress, had been summoned by the commissioners to shew cause before them why he should not pay the said sum. The plaintiff appeared by his attorney, and objected to the validity of the rate, but did not shew sufficient cause in the judgment of the commissioners.

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On the 21st of February, 1800, the Court of Sewers made an order, which was duly registered in the books of the said Court by the clerk of the commission, that in future two dyke-reeves should be appointed for the parish and hundred of Butterwick, one for North Butterwick, and one for South Butterwick and Butterwick Hundred, who should lay separate rates, and keep separate accounts of their respective offices. And this order had from thenceforward, up to the period of imposing the present rate, been acted upon; and the plaintiff, and the owners and occupiers of the plaintiff's lands in South Butterwick, have, since the year 1800, paid to the dyke-reeve of South Butterwick the separate rates levied in pursuance of the same order.

For all previous time within living memory, and also as far back as the records of the Court would shew, being more than 100 years, the whole parish and hundred of Butterwick had been jointly assessed to the repairs in question by one commixed assessment, applied by one sole dyke-reeve. There had been no presentment of a jury against South Butterwick and Butterwick Hundred, as a foundation either of the order or of the rate. The sea bank required repairs, and was a necessary protection to the lands, as well in North as South Butterwick and Butterwick Hundred; in fact, North Butterwick would, by any irruption of the sea, be laid deeper under water than South Butterwick or Butterwick Hundred, as it lay lower, and the drainage of all three was now, by a recent alteration, carried through North Butterwick to the Hob Hole Sluice. North Butterwick was nowhere assessed to the repairs of the bank.

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The following were the plaintiff's points for argument:—First, The rate purports to be founded on prescription, which is disproved; secondly, The rate is bad for omitting rateable property; thirdly, The rate is questionable in an action of trespass, there having been no presentment by a jury.

J. Hildyard, for the plaintiff.—The commissioners of sewers were bound to include in the rate all the land within the ambit of the parish and hundred, unless they could shew a custom or prescription from time immemorial to exclude North Butterwick, and impose a rate on South Butterwick and Butterwick Hundred only; and here no such custom or prescription is stated in the case. The commissioners were therefore wrong in imposing on South Butterwick and Butterwick Hundred alone the burthen of repairing a dyke which was equally beneficial to North Butterwick, which ought, therefore, to be included in the rate. The law is laid down in *Rooke's case*: thus: "That the commissioners ought to tax all who are in danger to be endamaged by the not repairing, equally and not him who has the land next adjoining to the river only; for the statute of 6 Hen. 6, c. 5, on which the commission of sewers is formed and specified, has precise words in the same commission, that no person, of any estate or condition, shall be spared: And if the law should be otherwise, inconvenience might follow; for it may be that the rage and force of the water might be so great, that the value of the land adjoining will not serve to make the banks, &c.; and therefore the statutes will have all which are in danger, and are to receive benefit by the making of the banks, to be contributory, for *qui sentit commodum, sentire debet et onus*; and the said statutes require equality which well agrees with the rule of equity." In *Emerson* 1.

Saltmarsh (a), it was held that a sewers' rate assessed in gross upon a township was bad. In *Rex v. The Commissioners of Sewers for the County of Essex* (b), Lord *Tenterden* says: "If no usage has prevailed, all those are liable who enjoy the benefit of the work."

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Wildman, for the defendant.—It would be a great hardship, if the omission of a single person in the rate were to render it void. [Lord *Abinger*, C. B.—This is the omission of a whole district.] The omission of a single person would equally render it void, if such a doctrine is to prevail as is contended for by the plaintiff; there can be no distinction in that respect. The question is, whether the omission of this district makes it so void as to render the commissioners liable in trespass. It is submitted that these collateral defects cannot be inquired into in an action of trespass. The rate being good in form, it is valid until it is quashed upon a certiorari. The commissioners of sewers, in making a rate, act in a judicial and not in a ministerial capacity, as was observed by *Patteson*, J., in *Pocock v. O'Shaughnessy* (c), and therefore are not liable to trespass. The Court of the Commissioners of Sewers is a Court of Record. Com. Dig. 'Sewers,' D.; *Callis on Sewers*, 128. Their power to hear objections is recognised in the recent statute for amending the law relating to sewers, 3 & 4 Will. 4, c. 22, s. 16. In the *Duke of Newcastle v. Clarke* (d), *Burrough*, J., says, "The commissioners are clothed with no individual rights as a consequence of their office; they act in their official capacity only. They are persons holding a Court of Record." Even assuming the rate, therefore, to be bad for want of a presentment, it would not render the commissioners liable to an action. The proper mode in such a case is to

(a) 7 Ad. & Ell. 206; 2 N. & P.

(c) 6 Ad. & Ell. 807.

446.

(d) 8 Taunt. 631; S. C. 2 Moore,

(b) 1 B. & Cr. 477; 2 D. & R.

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move that the rate be quashed on a certiorari. In *Ackerley v. Parkinson* (a), it was held that an action would not lie against the vicar-general of the bishop for excommunicating a person, although the citation was void, and the proceedings thereon had been set aside upon appeal. Lord *Ellenborough* there says, "If it were necessary, I should like to look at several of the authorities which have been cited. But the impression on my mind at present is, that this action is not maintainable, if the Ecclesiastical Court had a general jurisdiction over the subject-matter; and that it had general jurisdiction over the subject-matter, and in regard to some of the particulars mentioned in the citation, there can be no doubt." In *Emerson v. Saltmarsh* the point was not raised, whether trespass was maintainable; besides, the rate there was bad on the face of it. It has been held that no action lies against officers for a seizure to satisfy a poor rate, made by an order of justices acting within their jurisdiction. *Nichols v. Walker* (b), *Milward v. Caffin* (c). The commissioners cannot be liable in their individual capacity for what they did in their judicial capacity, having power under the stat. 4 Hen. 8, c. 5, s. 3, to hear and determine all matters relative to the making of a rate. In *Garnett v. Ferrand* (d), it was held that no action will lie against a judge of a Court of Record for an act done by him in his judicial capacity; and that therefore trespass would not lie against a coroner, for turning a person out of a room where he was about to take an inquisition. Whatever these commissioners have done in their judicial capacity cannot be impeached, until it is reversed by a competent tribunal. *Stafford v. Hamston* (e), *Fawcett v. Fowles* (f), *Dove v. Gray* (g), *Brittain v. Kinnaird* (h). Under the Statute of Sewers, every person whose property de-

(a) 3 M. & Selw. 411.

608.

(b) Cro. Car. 394.

(f) B. & Cr. 391; 1 Man. & Ry.

(c) 2 W. Bl. 1330.

102.

(d) 6 B. & Cr. 611; 9 D. & R.

(g) 2 T. R. 358.

657.

(h) 1 Brod. & B. 432; 4 Moore,

(e) 2 Brod. & B. 691; 5 Moore,

50.

rives a benefit from the works of the commissioners is liable to be rated, although the benefit be not immediate, *Soady v. Wilson* (a); and in an action of trespass against the commissioners for levying a rate, if it appear that they had jurisdiction, the Court will not inquire whether the rate was proportioned to the benefit received from the sewage by the party rated. Lord *Denman*, C. J., says in that case, "Though numerous cases were cited in the argument from *Keighley's case* (b) to *Rex v. The Commissioners of Sewers for the Tower Hamlets* (c), the doctrine laid down is all uniform and undisputed as applicable to the present question. It rests on the principle, that every one whose property derives benefit from the works of the commissioners may be assessed to the rates they impose."

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Hildyard, in reply.—The very foundation of the authority of the commissioners is, that they should inquire through the medium of a jury, and therefore a presentment was necessary. The 17th section of 3 & 4 W. 4, c. 22, provides, that nothing therein contained shall prevent any court of sewers from causing inquiry and presentment to be made by a jury; expressly recognising their authority to do so. Without a presentment, there would be nothing which could be traversed. In the case of *The Commissioners of Sewers v. Wilmore* (d), the Court refused a certiorari to remove a presentment for not repairing a sewer, on the ground that it did not appear that the commissioners had refused to allow the defendant to traverse it; but there there was no presentment, and nothing which could be traversed. These commissioners have entirely exceeded their authority, and are therefore liable to an action.

(a) 3 Ad. & El. 248; 4 Nev. & M. 477.

(b) 10 Rep. 142 b.

(c) 9 B. & Cr. 517; 4 Man. & R. 385.

(d) 2 Keb. 137.

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LORD ABINGER, C. B.—Suppose an action is brought in a Court where there is a limited jurisdiction, and the defendant pleads to the jurisdiction, the Court must decide whether they have jurisdiction or not; and if they decide that they have jurisdiction, in a case where they clearly have no pretence for it, and give judgment against the defendant, and act on that decision, they may be liable to an action. With respect to the case before the Court, I always thought that the jurisdiction of the commissioners of sewers was founded entirely on the presentment to be made by a jury; and if that be so, and they proceed without a presentment, their jurisdiction fails, and they are liable to an action like any one else. The case of *Ackerley v. Parkinson* is very distinguishable; there the vicar-general had a general jurisdiction over the subject-matter, and was bound to decide upon it when brought before him, one way or another; and although the Court above might set aside his adjudication, still he would not be liable to an action.

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said that the Court had considered the matter, and that it appeared to them that the plaintiff was entitled to judgment: that the foundation of the jurisdiction of the commissioners to make a rate was the presentment of a jury, without which the rate was utterly void, and consequently the warrant which was founded upon it was also void.

Judgment for the plaintiff.

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ROWE and Another v. AMES.

CASE.—The declaration stated a judgment recovered in the Court of Exchequer against one Richard Waring, for a certain debt, adjudged to the plaintiffs for their damages; that the said judgment being in full force, and the said debt and damages remaining unsatisfied, the plaintiffs, on &c. sued out a writ of testatum fieri facias, directed to the sheriff of Bedfordshire, commanding him, &c., which said writ was duly indorsed to levy 47*l.* 18*s.* 6*d.*, and was, before the return thereof, to wit, on &c., delivered to the defendant, who then and until after the return of the said writ, was sheriff of the said county of Bedford, to be executed in due form of law. It then alleged a seizure by the defendant, before the return of the writ, of the goods of the said R. Waring, within the bailiwick, and that the defendant remained in possession of the said goods for a long space of time, to wit, from &c., the money indorsed to be levied remaining all that time unpaid; that the defendant might have sold the said goods, but, intending to deprive the plaintiffs of the money indorsed and directed to be levied, he wilfully neglected the execution of his office, and wrongfully, and without the consent of the plaintiffs or either of them, forbore to sell, &c., from &c. (the date of the writ) until &c., when he, the defendant, returned that he had taken goods and chattels of the said R. Waring, to

In an action on the case against the sheriff, the declaration stated a judgment recovered against one R. W., the delivery to the sheriff of a writ of *fi. fa.* issued upon this judgment, indorsed to levy &c.; that the sheriff seized the goods of R. W. within his bailiwick, and remained in possession of them for a long time, during which he might and ought to have sold them, yet that he neglected the execution of his office, and forbore to sell, and afterwards falsely returned that the goods remained in his possession for want of buyers. —To this declaration the defendant pleaded—1st, that he did not take in execution any goods

of R. W., or remain in possession by virtue of the said writ for the said space of time, or any part thereof; 2ndly, that he could not, nor might, nor ought to have sold the said goods, or any of them, under or by virtue of the said writ, or to have raised thereout the monies indorsed to be levied, within the space of time in the declaration mentioned. 3rdly, that R. W. became a bankrupt, and that within two months after the issuing of the writ in the declaration mentioned, and the delivery thereof to the defendant, and of the seizure of the goods, and before the passing of the 2 & 3 Vict., c. 29, and before the defendant could or ought to have sold the said goods, a fiat issued, and the said R. W. was declared a bankrupt; and that, before the commencement of the action, an official assignee was appointed, in whom the said goods so taken in execution became and were vested.

Held, that the first plea was bad for duplicity; that the second plea was bad, as amounting to the general issue; and that the third was bad, as being an argumentative denial of the seizure of the goods of R. W.

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the value of the debt and damages and interest in the said writ mentioned, and then in and by the said return, falsely and deceitfully further returned, that the goods remained in his hands for want of buyers; by means whereof the plaintiffs were deprived of the benefit of the said writ, and now put to great costs and expenses, &c.

Pleas.—1st, that the defendant did not seize or take in execution any goods or chattels of the said Richard Waring, or remain or continue in possession thereof, by virtue of the said writ, for the said space of time in the said declaration in that behalf mentioned, or any part thereof, in manner and form as the plaintiffs have above in their said declaration in that behalf alleged, and of this the defendant puts himself upon the country, &c. Secondly, that the defendant could not nor might, nor ought, during any part of the time in the said declaration in that behalf mentioned, to have sold the said goods and chattels in the said declaration in that behalf mentioned, or any or either of them, or any part thereof, under or by virtue of the said writ, or to have raised thereout the monies indorsed on the said writ and directed to be levied, or any part thereof, ready to have been paid to the plaintiffs within the space of time, or before the day or year in the said declaration in that behalf mentioned, in manner and form as the plaintiffs have above in their said declaration in that behalf alleged; and of this the defendant also puts himself upon the country, &c. Thirdly, that long before the delivery of the writ of *fi. fa.* to the defendant, to wit, before and on &c., and from thence continually until the issuing of the fiat in bankruptcy thereafter mentioned, the said R. W. was a trader within and subject to the provisions of the stat. 6 Geo. 4, c. 16, and that the said R. W., so being such trader, on &c. became and was indebted to one G. W. in &c., and the said R. W. being so indebted, and being such trader as aforesaid, afterwards, and before the delivery of the said writ to the defendant as aforesaid, to wit, on &c., became and was a bankrupt, and that thereupon after-

wards, and within two calendar months of the issuing of the said writ, and of the delivery thereof to the defendant, and of the seizing and taking in execution of the said goods and chattels of the said R. W., and before the passing of the 2 & 3 Vict. c. 29, and before the defendant as such sheriff as aforesaid could, or might, or ought to have sold the said goods or any part thereof, under or by virtue of the said writ in the said declaration mentioned, to wit, on &c., a certain fiat in bankruptcy issued against the said R. W. by the Rt. Hon. Christopher Charles Lord Cottenham, &c., &c., by which fiat the said Lord Chancellor did authorize the said G. W. to prosecute his said complaint in the said Court of Bankruptcy in that behalf, (as by the said fiat duly filed and entered of record, and now remaining in the said Court of Bankruptcy, being a record of the said Court of Bankruptcy, reference being thereunto had, fully appears): by virtue of which said fiat, and by force of the statutes in such case made and provided, John Herman Merivale, Esq., being one of the Commissioners of the Court of Bankruptcy, afterwards, to wit, on the 23rd day of May in the year last aforesaid, did, in due form of law, find that the said R. W. had become and was a bankrupt within the true intent and meaning of the statutes made and then in force concerning bankrupts, before the day of the date and suing forth of the said fiat, and did then declare and adjudge the said Richard Waring to be a bankrupt accordingly, and afterwards, and before the commencement of this suit, to wit, on the 23rd day of May in the year last aforesaid, being the date of the said adjudication, the said John Herman Merivale, so being such commissioner as aforesaid, duly made a memorandum of the said adjudication; as by the said memorandum now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will more fully appear.—The plea then stated the due appointment of an official assignee, and that the estate and effects of the said R. W., including the said goods and chattels so seized and taken in execution under and by

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virtue of the said writ, became and were vested in the said assignee; and that the said fiat in bankruptcy, and the proceedings thereunder respectively, remain and are in full force and effect, and not in anywise abated, superseded, rescinded, or annulled. Verification.

Special demurrer, assigning for causes, that the first plea is double, in denying any taking in execution, and also denying a continuance in possession by the defendant for a time in which he ought to have sold. And also, that the defendant is estopped from denying the matters denied by that plea.

That the second plea amounts to the general issue, and is argumentative.

That the last plea is argumentative, in indirectly denying that the defendant seized any goods of the said R. W., and also that it is informal and uncertain.

Bramwell, in support of the demurrer.—The declaration begins by stating, in the usual way, the issuing of the writ of fi. fa., and the delivery of it to the sheriff, and then avers that he seized and continued in possession for a long space of time, during which he might have sold the goods, and complains that he did not do so. [Lord *Abinger*, C. B.—Is not the gravamen the charge of a false return? The declaration states that a false return has been made; but it is submitted that the action is not brought for that, but for a breach of duty in what took place before the return, viz. the not selling; and that the action would be maintainable, though the defendant had afterwards sold, for the damages sustained by his delay. This appears from *Aireton v. Davis* (a), and *Jacobs v. Humphrey* (b). [Alderson, B.—You say the declaration would be good, if every thing relating to the return were struck out? Yes; and it is questionable whether the return be false: as it seems

(a) 9 Bing. 740; 3 M. & Scott, 138. (b) 4 Tyr. 272; 2 C. & M. 413.

to mean no more than this, that the sheriff has not sold. Then the first plea is double; it denies the seizure, and it also denies that he remained in possession as alleged. [Lord Abinger, C. B.—If he did not seize, he could not remain in possession.] But the converse is not true; viz. that if he did seize, he must have remained in possession. The test as to whether a plea is double, is to strike out one of the allegations said to constitute the duplicity, and see if a sufficient answer remains in the other; and then, striking out the latter, let the first remain, and see if that constitutes an answer. If each of the allegations is an answer, and they do not involve each other, the plea is double. In this case, if no writ had been issued, the defendant could not have seized under it; yet no doubt a plea denying both the issuing of the writ and the seizure would be double. Tried by this test, then, the first plea is double. [Lord Abinger, C. B.—You say, under a denial by the defendant that he remained in possession, he could not have contested that he seized.] Certainly. [Lord Abinger, C. B.—That is so; but would a plea merely denying that he remained in possession be good? Must he not shew how he ceased to be in possession?] It would be bad in form, for that reason; but, it is submitted, good in substance. Suppose issue joined on such a plea, the defendant might show that he parted with the goods by the license of the plaintiff; or he might show, (what he no doubt intended to do in this case under that denial, viz.), that by reason of the bankruptcy, his continuance in possession was unlawful: he might even show a rescue.—[Alderson, B.—That would not excuse him.] It would show that the plaintiff's right of action was not that alleged here; because the sheriff could not then have been guilty of the delay alleged. Then it would be a good answer in substance; and a plea is not the less double, because one of the matters is informally pleaded. This plea, therefore, is double: but it is also bad for the other reasons assigned. The plaintiff does not contend that the

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defendant could not deny a seizure under the writ, but he complains of the manner in which he has done it. It is impossible, on reading the plea, to say what it admits or denies:—whether it denies a seizure altogether, a continuing in possession altogether, or, admitting both seizure and remaining in possession, or one of them, denies that both or either of them was under the writ. [*Alderson*, B.—You say he should have said he did not seize in manner and form.] That would have been correct; or if not, admitting a seizure, he should have said it was not by virtue of the writ. The plea is a negative pregnant, and the objection is very strong as to the denial that he continued in possession by virtue of the writ. [*Alderson*, B.—I cannot tell whether or not he admits he seized by virtue of the writ, and that he continued in possession, but denies that was by virtue of the writ. Lord *Abinger*, C. B.—There is another defect. How can he deny he seized, in the face of his return, which appears on the declaration?] That is the next objection. [*Bramwell* was then stopped as to the first plea.] Secondly, as to the second plea. [*Alderson*, C. B.—That is the general issue, if ever there was one; it denies the breach of duty complained of.] [The learned counsel was then directed to argue as to the sufficiency of the last plea.] The first objection to that is, that it is an argumentative denial of the allegation that the defendant seized the goods of Waring. *Wright v. Lainson* (a) is a direct authority to that effect. In that case, all the facts up to the return were precisely the same as here; and on an application to plead two pleas, one denying a seizure of the bankrupt's goods, and the other specially stating the bankruptcy, Lord *Abinger*, C. B., said, "They were at that time the goods of the assignees by relation to the time when the act of bankruptcy was committed, although the fiat was not issued until afterwards. It is quite clear, that to prove

(a) 3 M. & W. 44.

the shorter plea, you must prove the trading, the petitioning creditor's debt, and an act of bankruptcy before the date of the levy." *Alderson*, B., said—"To allow these pleas together would be introducing all the evil of double pleading, which it was the object of the rules to avoid." [Lord *Abinger*, C. B.—That case only shews that, under a traverse that the defendant seized the goods of the bankrupt, he might have shewn the bankruptcy, &c.; not that the special plea was bad.] It is submitted that the one proposition follows from the other; for if, under the traverse that Waring's goods were not seized, this matter may be shewn, then the special plea amounts to a denial of that fact, and so it is an argumentative traverse. The common test is, that a plea must either traverse, or confess and avoid. If this plea traverses, it is wrongly concluded. Then does it confess and avoid? Certainly not. It is also open to the same objection as the first plea; it is contrary to the return stated on the record. [He was then stopped by the Court.]

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Gunning, contra, relied upon *Lewis v. Alcock* (a), as an authority to shew that the second plea was good; but the Court intimated an opinion that the pleas were clearly bad, and he thereupon prayed and obtained

Leave to amend on payment of costs.

(a) 3 M. & W. 188.

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BIRD v. PENRICE.

A declaration in assumpsit contained a count in the sum of £200, for horse keep, and work and labour; and another count in the like sum upon an account stated. The defendant pleaded, as to all except £150, non assumpsit, and as to that sum payment. The cause was referred to arbitration, and the arbitrator awarded, as to the first issue, that the verdict should be entered for the plaintiff; and as to the second issue, so far as it related to £150, he directed a verdict to be entered for the defendant, and as to the residue of that issue, for the plaintiff; and he assessed the damages at 14*l.* 4*s.* 9*d.*, that being the balance which he adjudged to be due to the plaintiff:—*Held*, that the arbitrator was not bound to find the first issue distributively, so as to find for the plaintiff as far as related to 14*l.* 4*s.* 9*d.*, and for the defendant as to the residue.

THE first count of the declaration was in indebitatus assumpsit, in the sum of £200, for horse-keep, and work and labour; the second, on an account stated, for the like sum. Pleas, first, except as to 150*l.* 14*s.* 8*d.* non assumpsit; secondly, as to that sum, payment. The arbitrator not having determined the issue on the account stated, the Court, on a former day, directed the award to be sent back to him to be corrected in this particular. By a mistake in drawing up the rule, the *cause*, and not the *award*, appeared to be sent back to the arbitrator. The arbitrator refused to rehear the matter or to examine any witnesses, and he drew up his award in these terms:—"As to the first issue joined between the parties, I direct that a verdict shall be entered for the plaintiff; and as to the second issue, as far as it relates to 150*l.* 14*s.* 8*d.*, I direct that a verdict be entered for the defendant, and as to the residue of that issue, for the plaintiff, and I assess the damages at 14*l.* 4*s.* 9*d.*, that being the balance which I adjudge to be due to him."

Byles now moved for a rule to shew cause why the award should not be set aside.—As the *cause*, and not the *award* merely, was referred back to the arbitrator, it was his duty to have reheard the case and examined witnesses; and not having done so, the award ought to be set aside. Secondly, the plaintiff having succeeded as to part only of the first issue, the arbitrator should have found it distributively, in the same manner as he has done the second issue. The declaration claims two distinct items; but, according to this award, the plaintiff has failed as to part, and that ought to be found for the defendant, as

he is entitled to costs as to that part in which he has succeeded. *Anderson v. Chapman* (a) shews that the general issue may be found distributively. In *Prudhomme v. Fraser* (b), which was an action for a libel, there was but one count, and a plea of not guilty; the jury found a verdict for the plaintiff, and also that a great part of the alleged libel did not apply to him; and the Court decided that such part of the declaration was divisible, and that, in respect of it, the defendant was entitled to costs as to so much of the declaration as charged libellous matter, the innuendoes respecting which had been negatived. In *indebitatus assumpsit*, where several demands are included in one count, the issue is necessarily distributive. Here the arbitrator should have found, as to the first issue, as far as the same related to 14*l.* 4*s.* 9*d.* for the plaintiff, and as to the residue of that issue, for the defendant.

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LORD ABINGER, C. B.—We cannot grant this application. The arbitrator was not bound to rehear the case, the only object in sending the case back to him being that the award might be set right. Secondly, the arbitrator was not bound to find the first issue distributively. The plaintiff in his declaration charges the defendant with being indebted to him in the sum of £200, but that sum is not material, although in an action of debt the sum was formerly held to be so. There are no distinct issues raised on the first count. It is a single issue, raising the question whether the defendant is indebted to the plaintiff or not.

ALDERSON, B., concurred.

Rule refused.

(a) 5 M. & W. 493.

(b) 2 A. & E. 645; 4 N. & M. 512.

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GEORGE EDMUND PLATT and JUDITH ANNE, his Wife,
since deceased, Plaintiffs; and JOHN ROUTH, and Others,
Defendants.

BY an order of the Master of the Rolls, the following case was stated for the opinion of this Court.

J. R. by his will, after directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter J. A. P., J. R., J. S., and J. G., his executrix and executors, upon trust, to permit his said daughter to receive the rents and dividends thereof during her life, and after her decease, upon trust, for such person or persons (other than and except J. W. and his relations, M. H., and his relations, and the relations of

John Ramsden, of Hammersmith, &c., duly made and published his last will and testament in writing, bearing date the 10th day of March, 1825, and bequeathed unto his daughter, Judith Ann Platt, J. Routh, T. Sharman, and J. Gillett, (whom he appointed his executrix and executors), their executors, administrators and assigns, a certain leasehold messuage and premises situate at Hammersmith, for all such term, estate, and interest as he should have therein at the time of his decease, and all the household goods and furniture, plate and plated articles, china, prints and pictures, household linen, wine, spirits, and other household effects whatsoever, which should be his property in or about the same messuage and premises at the time of his death; upon trust, if the said Judith Ann Platt should so direct, but not otherwise, to sell the same in manner therein mentioned, and to stand

the late husband of the testator's said daughter, and every of them) in such parts, shares, and proportions, and in such manner and form, as the said J. A. P., whether sole or covert, should by will appoint, and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that in case his said daughter should intermarry with the said J. W., or any of his relations, or should reside with or receive visits from him or them, the bequests in her power should utterly cease. After the testator's death, the said J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and thereby, in exercise of the power under her father's will, she gave £10,000 Consols to the descendants of the before-named D. R., and gave all the rest of her late father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R. the testator.

Held, 1st, that, on the death of J. A. P. a duty of one per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects to J. A. P., after allowing any duty already paid in respect thereof.

2ndly, That no probate duty was payable upon the probate of the will of J. A. P., in respect of the estate and effects bequeathed and appointed by her will.

3rdly, That legacy duty was payable in respect of the bequests contained in the will of J. A. P. at the same rate at which it would have been payable if they had been mere legacies given by her, payable out of her own personal estate.

and be possessed of the money which should arise and be produced from such sale, after deducting the costs and expenses attending or incident to the same, as part of his residuary estate : And the said testator by his said wife also gave and devised, and by virtue and in exercise and execution of every power and authority in any wise enabling him in that behalf, appointed all and singular the freehold and copyhold messuages or tenements, lands, and hereditaments, then belonging to him the said J. Ramsden, either in possession, reversion, remainder, or expectancy, or in or over which he had any devisable interest or power of appointment, with their and every of their rights, members, and appurtenances, unto and to the use of the said Judith Ann Platt, J. Routh, J. Sharman, and John Gillett, their heirs and assigns, upon the trusts thereafter declared concerning the same, that is to say, upon trust, with the consent in writing of the said Judith Ann Platt during her life, and after her decease, then at their discretion, to make sale and absolutely dispose of the said hereditaments and premises in manner therein mentioned ; and the said testator thereby declared, that the money which should arise or be produced by or from such sale should fall into and be considered as further part of the residue of the personal estate of him the said testator, and that the rents and profits of the said premises in the meantime, until the same should be sold, should be considered as part of the income of the said residuary personal estate of the said testator, or of the stocks, funds, or securities in or upon which the same or the produce thereof was thereafter directed to be invested : and that the said monies, rents, and profits respectively, should be subject to the dispositions thereafter made of and concerning the residue of the said personal estate of the said testator, and the income thereof : And the said testator thereby also gave and bequeathed to each of them the said J. Routh, J. Shar-

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man, and John Gillett, respectively, the sum of £400 £ per cent. Consolidated Bank Annuities; and to each of them the said J. Sharman and J. Gillett respectively, the further sum of £2000 of lawful money; to Hannah Keen Routh, the sum of £200 of like lawful money; to Joseph Chapman, £100 of like lawful money; to J. Blagborough, £50 of like lawful money; and to Elizabeth London, during her life, an annuity of £25: And the said testator also gave and bequeathed unto the said Judith Ann Platt, J. Routh, J. Sharman, and J. Gillett, all his leasehold messuages, tenements, and lands, with the buildings and appurtenances thereunto belonging, except the leasehold premises at Hammersmith, which he had thereinbefore disposed of as aforesaid, for all such term and estate as he should have therein at his decease, and all the rest and residue of his money, and securities for money in the funds, goods, chattels, and personal estate whatsoever and wheresoever, not thereinbefore given or bequeathed, upon trust that they, or the survivors or survivor of them, his executors, administrators, or assigns, should, as soon as they conveniently could after his decease, collect, get in, and receive all such money as should be then due to him from any person or persons whosoever; and should sell, dispose of, and convert into money his said leasehold premises, and such part of his residuary personal estate as should not consist of money or monies in the funds, and should, by and out of that part of his personal estate which should consist of money, and the money to be collected as aforesaid, and the produce of any other stock or funds belonging to him the said testator, which his said trustees were thereby authorized and empowered at any time to sell and dispose of, pay and discharge all his the said testator's just debts and funeral and testamentary expenses and the legacies and sums of money thereinbefore bequeathed, and directed to be raised and appropriated for

the purposes thereinbefore mentioned, and should lay out and invest the residue of the said trust-monies, and also the monies which should arise from the sale of the said freehold and copyhold hereditaments thereinbefore devised, in the joint names of them the said trustees, in case, as to the said last-mentioned monies, such sale or sales should be made in the said Judith Ann Platt's lifetime, in or upon any of the Government stocks or funds of Great Britain, or upon real securities in England, and should from time to time vary and change the securities in or upon which the said trust-monies should then be invested, either as occasion should require, or as the said Judith Ann Platt should think fit; and should stand and be possessed of the said trust-monies and premises, and the stocks, funds, and securities belonging to the said testator, or so much and such parts of the same as should not be disposed of as aforesaid, and the dividends, interest, and income thereof, and also of the rents and profits of the said testator's freehold and copyhold hereditaments and premises, until the sale of the same, upon the trusts thereafter mentioned, that is to say, upon trust that his said trustees or trustee for the time being should pay the dividends, interest, and income of all and singular the said trust-monies, stocks, funds, and securities, and the rents and profits of the said testator's freehold and copyhold hereditaments and premises, until such sale thereof as aforesaid, unto, or otherwise permit and suffer, the said Judith Ann Platt, or her assigns, to receive the same for the term of her natural life; and from and immediately after her decease, then upon trust that his said trustees or trustee for the time being should pay thereout £3000 of lawful money to the said John Sharman, and £3000 of like money unto the said John Gillett; and the said testator thereby directed, that after such last-mentioned payments, his then surviving trustees should stand and be possessed of the said trust

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monies, stocks, funds, and securities, and the dividends, interest, and income thereof, and of the rents and profits of his said freehold and copyhold hereditaments and premises, until the sale of the same, upon trust for such person or persons (other than and except Joseph Woodhead, otherwise Woodward, of Russia Row, Cheapside, and his relations, Moses Hoper of Dorset Street, Esq., and his relations, and the relations of the late husband of the testator's said daughter, and every of them) in such parts, shares and proportions, for such intents and purposes, and in such manner and form as the said Judith Anne Platt, as well when covert or sole, and notwithstanding her coverture, by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by two or more credible witnesses, should direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, should not extend, upon trust for the next of kin of Dyson Ramsden, late of Waterclough, in the parish of South Oram, near Halifax, in equal shares and proportions, and to pay the same accordingly. And by the said testator's will it is provided, and he did thereby expressly declare his will and mind to be, that in case his said daughter Judith Ann Platt should at any time thereafter intermarry with the said Joseph Woodhead, otherwise Woodward, or with any of his relations, or in case she should reside with or should visit or receive visits from him the said Joseph Woodhead, otherwise Woodward, or any of his relations, then, and in any or either of the said cases the said testator declared, that all and singular the gifts and bequests to, and the trusts contained in his said will in favour of, and the power of appointment therein-before given to, the testator's said daughter, should from thenceforth be absolutely null and void to all intents and

effects and purposes, and then and from thenceforth the said testator directed that his said trustees, their executors, administrators, and assigns, should stand and be possessed of all and singular the said trust-monies, stocks, funds, and securities, upon trust with and out of the said dividends, interest, and income thereof, to pay to his said daughter the weekly sum of 40s., and no more, during her life; and subject thereto, it was the testator's will that the whole of his said trust monies, stocks, funds, and securities, and the dividends, interest, and income thereof, should go and belong to, and be held in trust for, the next of kin of the said Dyson Ramsden, to whom the said testator gave and bequeathed the same accordingly; and the testator declared that the right of his said daughter to consent to the sale of his said freehold and copyhold premises should absolutely cease and be void, and his said trustees should be at liberty to proceed to a sale thereof, in the same manner as if the said testator's daughter had actually departed this life.

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The said John Ramsden, on the 10th of May, 1826, died without having altered or revoked his said will, leaving the said Judith Ann Platt, being his only child and heiress at law, and sole next of kin, him surviving, and also leaving the said several other legatees in the said will mentioned, excepting the said wife of the said testator, him surviving. And after the death of the said testator, the said will was duly proved by the said Judith Ann Platt, John Routh, John Sharman, and John Gillett, in the Prerogative Court of the Archbishop of Canterbury.

Soon after the death of the said testator, the said Judith Ann Platt filed a bill in the Court of Chancery against the said John Routh, John Sharman, and John Gillett, the other executors and trustees named in the said testator's will, praying that the trusts of the said will might be carried into execution under the decree of the said Court, and that the usual accounts might be taken

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of the said testator's estates, debts, and legacies, and that the residue might be invested and secured in the said Court, upon the trusts of the said will; and that the income thereof might be paid to the said Judith Ann Platt, according to the trusts of the said will.

By a decree made on the hearing of the said cause, by his Honor the Master of the Rolls, bearing date the 10th day of March, 1828, his Honor did declare that the will of the said testator ought to be established, and the trusts thereof performed and carried into execution, and did order and decree the same accordingly. [The case then set forth an account of the testator's property, which is not material.]

After the death of the said John Ramaden, the said Judith Ann Platt intermarried with the said George Edmund Platt, who survived her, and she, being under coverture, duly made and published her last will and testament in writing, bearing date the 27th day of April, 1837, signed and published by her in the presence of and attested by three credible witnesses; and thereby, after reciting the last will and testament of her father, the said John Ramaden, and the said power of appointment to her thereby given, she the said testatrix, pursuant to and by force and virtue and in exercise and execution of the power or authority to her for that purpose given or limited, or in her vested in or by the said will of her said father, and of all other powers and authorities enabling her in that behalf, directed and appointed, that immediately from and after her decease, all the residuary personal estate of her said late father, of which she had any disposing or appointing power under or by virtue of his said will, should be in trust, and be conveyed and assigned, and paid and payable, to William Walker Drake, Esq., his heirs, executors, administrators, and assigns, according to the nature and quality of the said estates respectively; but nevertheless, upon and

for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations therein-after expressed and declared of and concerning the same. And in further exercise of the said power or authority in her vested as aforesaid, the said testatrix did thereby direct and declare, that, immediately after her decease, there should be raised and paid out of the real and residuary personal estate of her said late father, the legacies or sums thereafter mentioned, that is to say, [setting forth various legacies to different persons, which it is unnecessary to state]. And the said testatrix did also direct and declare, that there should be paid unto the defendants Sarah Denison, Sarah Pickels, Mary Bagerley, Susanna Wilson, Robert Ramsden, William Ramsden, Rose Frith, Thomas Leeming, Sarah Cropper, and Elizabeth Tattersall, or such of them as should be living at the time of her decease, and to the personal representatives by way of substitution of such of them as might be then dead, and unto any other person or persons living at her decease, who, in case the said testatrix had died without exercising the power given to her by the will of her said late father as aforesaid, would have been entitled to all or any part of his real and residuary personal estate, under the description in his said will of next of kin of Dyson Ramsden, late of Waterclough, in the parish of South Oram, near Halifax, in the county of York, deceased, or the personal representatives, by way of substitution, of any of them who might be then dead, the sum of £10,000, £3 per cent. Consolidated Annuities, to be divided between or amongst them, or their respective representatives by way of substitution as aforesaid, in equal shares or proportions; but so that such respective personal representatives should be entitled to no greater or other shares than their respective testators or testatrixes, or persons intestate, as the case might be, under whom such representatives might respect-

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tively claim, would have been entitled if then living; and the said testatrix desired the said sum of £10,000, £3 per cent. Consolidated Annuities, to be paid within six calendar months next after her decease: and subject to and charged and chargeable with the payment of the said legacies and annuities thereinbefore appointed, given, and bequeathed, the said testatrix did thereby appoint, give, bequeath, and devise all and singular the freehold and copyhold hereditaments, and parts and shares of freehold and copyhold hereditaments, leasehold premises, furniture, stocks, monies, mortgages, securities, shares, and all other real and residuary personal estate and effects of her said late father, and over which she had any disposing or appointing power under or by virtue of his said will, unto the said William Walker Drake, his heirs, executors, administrators, and assigns; and the said testator did thereby appoint the said William Walker Drake, and also George Edmund Platt, Esq., executors of her said last will.

The estate and effects so bequeathed and appointed by the said last-mentioned will, consisted of £1000 East India stock, £20,000 Reduced £3 per cents., £40,000 New £3½ per cents., £40,000 Reduced £3½ per cents., £20,800 £3 per cent Consols, 3333*l.* 6*s.* 8*d.* £3 per cent Consols, and 833*l.* 6*s.* 8*d.* like stock, subject to the respective life interests of Robert Ramsden and his children, and of Elizabeth London, and other effects of the value of 6050*l.* 2*s.* 4*d.*

All the persons named as cestuique trusts in the appointment made by the will of Mrs. Platt, whereby she limited and appointed all the residuary personal estate of the said John Ramsden to William Walker Drake, were strangers in blood both to Mr. Ramsden and to Mrs. Platt, except the descendants of Dyson Ramsden, to which descendants the sum of £10,000 consolidated Bank Annuities was given, and which Dyson Ramsden was the son of a brother of the father of the testator, John Ramsden.

The questions for the opinion of the Court were:—

First. On what principle is the legacy duty payable in respect of the bequest, in the said will of John Ramsden, of the residue of his estates and effects to Judith Ann Platt to be calculated?

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Secondly. Whether probate duty is payable upon the probate of the will of the said Judith Ann Platt, in respect of the said estate and effects bequeathed and appointed by her said will as aforesaid: and if the Court shall be of opinion that probate duty is payable only in respect of some portion of the said estates and effects, then,

Thirdly. In respect of what portion of such estate and effects is probate duty payable?

Fourthly. Whether legacy duty is payable in respect of the several bequests contained in the said will of the said Judith Ann Platt: and if the Court shall be of opinion that legacy duty is payable in respect thereof, then,

Fifthly. At what rate is the legacy duty payable in respect of the said several bequests respectively to be calculated?

The case was argued in Easter Term last, by

The Solicitor-General, for the Crown.—In arguing this case, it may perhaps be more convenient to take the fourth question first; which raises the point whether legacy duty is payable by the appointees under Mrs. Platt's will, as the others will depend mainly upon that. There are three points that arise upon this part of the case: the first is, whether the duty is not payable from these appointees as from strangers in blood taking under Mrs. Platt's will, that is, £10 per cent. upon the amount of the legacies. By the stat. 55 Geo. 3, c. 184, schedule, part 3, the duty is given upon "legacies," and one question will be, what is the sense in which the legislature has used the

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word "legacies," in respect of which the duty is imposed. Whatever questions might arise in many cases upon that subject, the legislature has rendered unnecessary the discussion in this case, because it has given its own definition of what shall be deemed a legacy. It will be necessary to call attention to the 36 Geo. 3, c. 52, s. 7, a statute which is still in force with regard to all its provisions that apply to this case, although repealed with regard to the amount of the duty. The fourth section of the 45 Geo. 3, c. 28, will also be found material. The former defines what is to be considered a legacy where it is derived from *personal* property only; and the latter repeats that definition in respect to charges upon *real* property. By the 36 Geo. 3, c. 52, s. 7, it is enacted, "That any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix, which shall give the same; except so far as the same shall be satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect as a *donatio mortis causæ*, shall also be deemed a legacy within the intent and meaning of this act." The enactment in the 45 Geo. 3, c. 28, s. 4, is to the same effect, only extending it to charges upon real estate. The effect and bearing of the several statutes cannot be better or more distinctly stated, than in the words of Lord *Lyndhurst*, C. B., in delivering the judgment of

this Court in the case *Ex parte Cholmondeley* (a). His Lordship says:—"The facts of the case were these: Upon the marriage of Mrs. Cholmondeley, the sum of £20,000 was vested in trustees, upon trust, as far as related to the income arising out of that money, to her father for life, and to her husband for life, and in the event of her surviving, to her for life, and in the event of her having no children, with a power to her to appoint that sum of money. The result was, she had no children; and she made a testamentary appointment conformably to the authority thus given. The question is, whether the money taken under that testamentary appointment is subject to the legacy duty imposed by 55 Geo. 3, c. 184. In the schedule to that act, the duty is imposed upon every legacy payable out of the personal estate of the testator. It was contended at the bar, that this was not a legacy payable out of the personal estate of the testator, and that it did not come, therefore, within the words or within the meaning of the act, and that the duty, therefore, was not payable. In order to come to a right conclusion upon this subject, it is necessary to advert to the previous acts imposing duties upon legacies. The three first—20 Geo. 3, c. 28, 28 Geo. 3, c. 58, and 29 Geo. 3, c. 51, impose the duties upon a receipt or acquittance given upon the payment of legacies left by any will, in general terms, leaving the Court to define what was meant as a legacy within the meaning of the act of Parliament. The next act, namely, 36 Geo. 3, c. 52, in the clause imposing the duty, enacts, that the duty shall be payable upon all legacies paid out of the personal estate of the testator; but in the 7th section of that act there is a declaration of the legislature as to what is to be deemed a legacy within the meaning of the act. By the 7th section

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it is enacted, that all gifts payable out of the personal estate of the testator, or out of the personal estate which the testator has the power of disposing of, shall be deemed and considered a legacy within the meaning of the act of Parliament. The legislature, therefore, in the act itself, interpreted and defined what is meant by a legacy payable out of the personal estate. The next act is the 44 Geo. 3. c. 98; in that act there is no section or provision corresponding with the provision to which I have adverted in the 36 Geo. 3, describing what the legislature meant by the term 'legacy' within the meaning of that act. However, if the question had arisen upon the 44 Geo. 3, I should have been of opinion, that as the legislature had in the previous act defined what is meant by the term 'legacy,' it would be considered that the legislature used the term (the act being passed in *pari materia*) in the same sense and to the same extent in which it had used it in the previous act; and it appears to me obvious that this must have been the meaning of the legislature, because the object of the 44 Geo. 3 was to consolidate the regulations and provisions of the previous act, and to consolidate the duties. There is no intimation whatever in the 44 Geo. 3, that there was any intention to reduce the duties; that leads, therefore, I think, fairly to the conclusion, that the legislature would not have intended, under the term 'legacy,' to give a more limited meaning to that term than it had in the 36 Geo. 3. We are led to the same conclusion by the consideration of the 45 Geo. 3, c. 28, which was passed in the following year. By the 45 Geo. 3, the duty is made payable upon legacies out of any real or personal estate of the testator. In the 45 Geo. 3 there is a clause similar to the 7th section of the 36 Geo. 3, defining what the legislature meant by the term 'legacies,' and in that description it states, that any gift payable out of the personal estate, or out of any personal estate which the testa-

tor has the power of disposing of, shall be considered a legacy within the meaning of that act. So that, under the 36 Geo. 3, and under the 45 Geo. 3, the legislature has distinctly defined what is meant by the term 'legacy;' and it seems impossible to come to a conclusion, that in the intermediate act of 44 Geo. 3, it intended to give a different interpretation to the term, or that it should have less effect than in the previous and subsequent acts. I should think, therefore, it is perfectly clear under the 44 Geo. 3, that the term 'legacy,' meaning any legacy payable out of the personal estate of the party deceased, would not only extend to a legacy properly payable out of the personal estate, but to a legacy payable out of any property which the party had the power of disposing of by will. If that be so, the language of the 48 Geo. 3 is the same in substance as that of the 44 Geo. 3, and the language of the 55 Geo. 3 is the same as that of the 48 Geo. 3. Taking all the acts together, therefore, applicable to the same subject, and passed in *pari materia*, and the legislature, in the 36 Geo. 3 and the 45 Geo. 3, having described and defined what they meant by a legacy, and having given no such description as to the intermediate act of 44 Geo. 3, but it being obvious what their meaning was with respect to the act, it seems impossible to come to a conclusion, that they meant to use that term in a more limited sense in the 48 Geo. 3 and the 55 Geo. 3. If that be the true meaning of the act of Parliament, it will follow, that, under the 55 Geo. 3, the duty would be payable, not only upon a legacy payable out of the personal estate, strictly considered, of the testator, but out of any personal estate which the testator had the power of disposing of as he or she might think proper. That would apply to the present case. We are of opinion, therefore, that, considering all the acts together, the duty is payable in respect of this property, which was taken by the appointees under the will of Mrs.

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Cholmondeley." The particular form in which that power was created differed from the present case, in this, that there it was created by deed and here by will; and it was given upon different events from those that apply to this case; but with respect to the point upon which the judgment must turn, it is not distinguishable from the present case. By the will of Mrs. Platt, certain persons are to take certain benefits; and the question is, whether the benefits so taken are or are not, under these acts of Parliament, *legacies* paid out of the estate of which Mrs. Platt had the power of disposition. It is submitted that they are, and that they fall within the definition in the 36 Geo. 3, which has been held to be applicable to the 55 Geo. 3. The object of the legislature was to make persons, taking property by way of bounty under testamentary dispositions, contribute to the burthens of the state a portion of their gains: and these provisions have been directed, as far as possible, to prevent evasion of the general object that the legislature had in view; and it has, therefore, generally been determined, that the legacy duty is to be satisfied out of the personal estate of the testator immediately making the will, or any other personal estate of which the testator has the power of disposition. The only question which arises in the present case is, whether, Mr. Ramsden having thought fit to exclude any destination of his bounty in favour of three distinct families, that can be said to prevent the application of the words in the 7th section, "out of any personal estate which such person shall have power to dispose *as he or she shall think fit.*" The circumstance of particular persons being excluded stands upon very different grounds from that of a will prescribing in whose favour the power shall be exercised. The act would become a dead letter, and persons would at once be able to give a power to dispose of their property without rendering it liable to legacy duty, if the introduction of such an

exception would have that effect. Nothing would be so easy as to exclude a particular person or class of persons, as Commissioner Lin, or the Commissioners of Stamps, and entirely to evade the act, if such an exception were to have that effect. To prevent the parties from having the power to dispose of the property as they think fit, within the meaning of the act, there must be not only an exception and exclusion, but also some control and direction. Here there is no compulsion upon Mrs. Platt to make any appointment in favour of any particular person or class of persons. The words of the act must be reasonably construed, and to have the effect of preventing their application, there must be a control of a very different kind upon the party having the power of appointment, than the exclusion of families or persons, such as are alluded to in this case.

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But further, Mrs. Platt was possessed of a *general power* under the will of Mr. Ramsden, which is within the meaning of the words "general and absolute power of appointment," in the 18th section of the 36 Geo. 3, c. 52. That clause may be divided into three parts: The first deals with dispositions, where there is a power to appoint in favour of clearly designated individuals, which is not applicable to the present case. It next deals with dispositions made by persons who would themselves take nothing upon failure of appointment; and it enacts, that "where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect

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thereof." That applies to the case of the person to whom the property would go in default of appointment; in the present case it goes to the next of kin of Mr. Ramsden, in the event of the power not being executed. The third part deals with the execution of powers by persons who would be entitled upon failure of the execution of the power; and in that case, as the persons would be entitled upon failure of appointment, and the execution of the appointment rests in their own discretion, they are called upon to pay the duty accordingly. It enacts—"And where any property shall be given with any such general power of appointment, which property, in default of appointment, will belong to the person or persons to whom such power shall also be given, such property shall be charged with and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment." The words "general power" are there used in the sense of and as applicable to a party not being restrained as to the persons to whom they shall give the property; where they are not compelled to give it to certain specified persons, and only restrained as to a few persons or classes of persons. It is in that sense that the words "general power" and "absolute power" are used in that section.

But further than this, the execution of the power in this case operated upon a part of the personal estate of Mrs. Platt. This is a power of appointment, with regard to which the law deals in a particular manner. If Mrs. Platt had not been a married woman, and had been a person capable of contracting debts, the execution of this power would have made the property amenable to the payment of her debts. Equity would have ingrafted upon the power an implied pecuniary trust in favour of her creditors. With the exception of the families mentioned,

she had the absolute power of appointment, and could appoint in favour of her creditors if she thought fit, and equity would imply that she intended a trust in their favour.

[*Rolfe, B.*—You mean, supposing she made a will executing the power?] Yes. Where a party having a general power of appointment does not appoint at all, the creditors can take nothing; but where the party has executed the power of appointment, (not in favour of creditors, but in favour of certain persons), the will is superseded by an implied trust in favour of creditors; and equity regulates the trust, and applies the fund to the payment of debts. The effect of that rule is, to give Mrs. Platt such a power of disposition, that the property may be affected by contracts made by her during her life: and though the disposition cannot operate until she dies, when the will first comes into effect; yet, there being such a general power, there can hardly be a more distinct proof that, within the meaning of this act, it becomes a part of her personal estate and effects, than that equity should make it applicable to the payment of her debts, superseding her express appointment. On the same principle it becomes subject to legacy duty, on the ground that it passes as part of her personal estate. The authorities, with regard to this part of the case, bear more upon the subject of probate than of legacy duty, but still they are applicable. The cases are *Palmer v. Whitmore* (a), *Attorney-General v. Staff* (b), and *Vandiest v. Fynmore* (c). In the two first cases, the probate duty was held to be payable upon the will of a party executing a power, and that the property was to be considered as part of the personal estate. In the third case, a supposed distinction is taken between the case where the power is created by deed, and

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(a) 5 Sim. 178.

(b) 2 C. & M. 124.

(c) 6 Sim. 570.

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where it is created by will; but it will be found, on more careful examination, that there is no ground for that distinction. In *The Attorney-General v. Staff*, the case of *Palmer v. Whitmore* was recognised and acted upon. Lord *Lyndhurst*, in delivering the judgment of the Court, says, "In the *Attorney-General v. Staff*, which was argued yesterday, we are of opinion that the estate is subject to probate duty in respect of the property in question. Matthew Stainton, by his will, bequeathed the sum of £4,000 £3 per cent. Consolidated Bank Annuities, to trustees, subject to a general power of appointment in Judith Staff. Shortly after the death of Matthew Stainton, the testatrix Judith Staff executed the power of appointment by appointing the property to herself and another person, subject to a new power of appointment created by herself. That second power of appointment was also a general power of appointment, corresponding in substance with the former power. The second power of appointment was executed by her will. The property, by the execution of the power of appointment, became liable to her debts, and became her personal estate; she had an absolute control over it. She was not a mere trustee, but had a beneficial interest in the property. The case, therefore, comes within the very words of the 38th section of the 55 Geo. 3, c. 184, and clearly within the spirit and meaning of it. We are of opinion, therefore, that the probate duty attaches. In the case of *Palmer v. Whitmore*, the same question appears to have been decided, upon exceptions to the Master's report, by the Vice Chancellor, and there was no appeal from that decision." These cases were determined upon the ground that, for the purpose of this act, the effect of the power, coupled with the execution of it, made the property pass as part of the personal estate, so as to render it liable to duty. In *Vandiest v. Fynmore*, the testator gave to A. a power to dispose by her will of £5000, part

of his estate, on which probate duty was paid. A. exercised the power by her will; and it was held, that probate duty was not again payable in respect of the £5000. *Palmer v. Whitmore* and *The Attorney-General v. Staff* were there cited, and the Vice-Chancellor, in giving judgment, said, "The cases relied on by the Commissioners of Stamps do not apply; for in those cases, the powers were created by deed. Here the power was given by the will of the original testator, and the appointees take as if they had been named in his will. Notwithstanding the Attorney-General does not appear on this petition, the point is so clear, that I do not think it necessary to send a case for the opinion of the Court of Exchequer; but I shall make an order according to the second alternative of the prayer." That second alternative was, "that the petitioner (the executor) might be at liberty to defend any suit, action, or other proceeding which might be brought against him for payment thereof." But there is, in truth, no such distinction as the one there taken. How does it differ, as concerns the party executing the power, whether it is made in execution of a power created by deed or by will? There is no reason why a party should pay legacy duty or probate duty upon a will made in execution of a power created by a deed, and not pay it upon a will made in execution of a power created by will. The legislature could not have intended any such distinction. Whatever technical rules may be acted upon in equity, in construing and giving legal effect to a power when executed, and holding that the parties take in a certain way under the original power when that power has been executed, they can have no effect in a court of law. If the power is created by deed, according to the doctrine of a Court of Equity, they take under the original deed, and would have to pay probate duty; and why not, when they take under the original will? [*Parke, B.*—The Vice-Chancellor seems to have

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thought that the Crown were not entitled to have the probate duty twice.] That is not the ground upon which the case is put by his Honor; but he appears to have had in his mind the technical rule, by which it is said that the person who takes under an appointment must be said to take under the original grant or will creating the power, and that you must refer back to the original creation of the power, and, construing the instrument creating the power and the instrument executing the power together, you will be able to give to the whole the effect to which it is entitled.

The next question is, whether probate duty is payable or not. That depends upon the third part of the schedule, by which duty is imposed upon the probate, "where the estate and effects for or in respect of which such probate, letters of administration, confirmation, or eik, respectively shall be granted." Now, it can hardly be contended that this probate was not granted for or in respect of the estate and effects in question. Where a power is to be executed by will, it is requisite that it should have all the legal incidents of a will; the party purporting to execute by will must comply with the Statute of Frauds in every respect and it can only be recognised as a will when it is properly proved, and the probate duty paid upon it. With respect to any part of the estate and effects over which there is a power of appointment, but for or in respect of which no probate can be produced, there is a failure of appointment. The power is only exercised for or in respect of so much of the property as the probate duty is paid upon; the law recognises no will but by the probate, which is indispensable to give effect to the power, and to give a right to the possession of the property. It is just as necessary that there should be a probate of the will, as if the property was absolutely and independently the property of the testator. [Lord Abinger, C. B.—The ex-

ecutor, in order to give it to the appointee, must prove the will. It could not be taken by the executor of the former testator. *Parke, B.*—There must be a probate; but the question is, what is the amount of the stamp duty.] Independently of this being a general power, is the legal effect of this will such as to make it liable to probate duty for or in respect of the estate and effects in question? If the intention of the legislature had been confined and limited to the property which, in the strict sense, was in the power of the testator, very simple words, capable of expressing that intention, would have been found in the act; but inasmuch as the legislature have contemplated that the will would have effect, when the duty must be paid, upon property which was not strictly the property of the testator, it uses the words “estates for or in respect of which the probate is granted.” [*Parke, B.*—These words are added “exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially.” *Rolfe, B.*—The argument on the other side will perhaps be this: that this is property which the testatrix, as trustee, is to dispose of to some others of mankind than those named in the will.] But to make that argument available, it must be shewn that the party having the power of appointment is a trustee, which she would not be unless there be persons named as the objects of the trust. If there is a special power of appointment to the children of A. B., and no bequest over, in that case equity will consider the party having the power of appointment a trustee to execute in favour of those persons; but that cannot be the case where the property is given over. In this case, in default of appointment, the property is given over. Now this is the power of giving to all the world, excluding the persons excepted. Then for whom is the party trustee? The party having the power of appointment cannot be made trustee

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by the very instrument by which she gives the property. The doctrine of trusts, in respect of persons having a power of appointment, can only apply to a case where you can tell who is the cestui que trust; but in this case that would be perfectly impossible: it will be difficult therefore to raise any argument as to its being a trust; but if there should, at all events this is not the species of trust contemplated by the act; because powers of this description are subjects of specific enactments, and are dealt with in a different mode, which shews that the legislature has not so treated them. The legatees can only escape the probate duty by shewing that the probate is not essentially necessary to make a part of the title of the party claiming the property, and that it is not probate in respect of that property. But it is clear that it is by the probate they take everything, and that it is the foundation of their title. It is submitted, first, that the claim of the Crown is established to the probate duty upon the property over which Mrs. Platt exercised the power of disposition; next, that the persons she has appointed are liable to pay as strangers, they taking under her will, and that it would not matter if they could make out that they took under the original will, because there is only £10,000 out of £130,000 which would not go to strangers in blood.

But there is a third question, which is, what rate of legacy duty the fund is liable to in respect of Mrs. Platt's interest under the original will; and that depends upon the 18th section of 36 Geo. 3, c. 52, coupled with the 7th section. It has already been shewn that this is a general power of appointment, under the 18th section; upon the execution of which a certain duty becomes payable by her, namely, one per cent. in respect of the property so falling within her general power of disposition. [*Parke, B.*—You say that this is a general power of appointment, and that, when she executes the power, she must pay one per cent.

upon the total succession, deducting what she had paid upon the life interest.] Certainly. For these reasons, it is submitted that there ought to be judgment for the Crown on all the questions in the case.

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Teed, for the appointees.—No probate duty is payable upon Mrs. Platt's will, in respect of the property, the subject of her appointment; and whatever legacy duty is payable, (if any be payable at all), is payable only upon the will of Mr. Ramsden. The case entirely depends upon the construction which is to be put upon the act by which the duties are imposed. Looking at the circumstances of the case, whether the restriction as to the persons named in the will is a restraint really intended to operate upon the party, or introduced colourably, as it might have been if Commissioner Lin had been specified, the question is, whether the Court can see that Mrs. Platt had such an absolute power of appointment, as, if exercised, might have made the estate her own, and so liable to legacy and probate duty; or whether it would be liable to probate duty in any case. By the 36 Geo. 3, a legacy is defined to be a testamentary gift which is "to be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit." Under the Probate Duty Act, it is duty payable upon the estate of the deceased "in respect of which the probate is granted." So that, when both acts are taken together, the legacy duty may be payable out of the property of the deceased, or not out of the property of the deceased, but out of property subject to the absolute disposition of the deceased; but unless the probate duty be paid out of the property of the deceased, or the property which he had the absolute disposal of, it is very possible that legacy duty may be payable out of property in respect of which no probate duty is payable. The *Soli-*

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citor-General has referred to the words of the schedule, part 3. of the 55 Geo. 3, c. 184, and he says, that, inasmuch as the power of appointment created by will is to be exercised by will, the Court cannot recognise that to be a will which is not established as such in the Ecclesiastical Court, or, in other words, has received probate, and that the stamp duty must be paid upon every thing in respect of which probate is granted. It is submitted, however, that the stamp duty is to be, not in respect of every thing for which probate is granted, but in respect of *the estate of the deceased*, in respect of which probate is granted. If the property is out of the jurisdiction, the probate duty does not operate. Where there is a limited power of appointment, a mere naked power of deciding in what proportions a certain class of persons shall take a certain sum of money, though that power is to be exercised by will, and the will must be proved before it can take effect, no one can contend that the probate duty is payable upon such property; yet the will must be proved; and it may be in respect of that very property that it must be proved. It is impossible to contend that probate duty is payable upon such a mere naked appointment.

But then it is said, that the donee of the power is a trustee for the objects of the power. No authority has been cited for that, and it is submitted that it is not so. The donee may execute the power or not, at her option. There would be no breach of trust in her not doing so. There is a power of discretion conferred on her, to exercise the power and select the objects of it, but there is no trust. The not executing the power, or the executing it, would not make the object of the power come within the exception, "exclusive of what the deceased shall have been possessed of or entitled to as trustee for any other person or persons, and not beneficially." That this is the correct view of the case will be seen, by looking

at the different provisions made in the act for securing the payment of the legacy duty. By the 38th section of the 55 Geo. 3, c. 184, it is provided, that before probate is to be granted, an affidavit is to be made by the party taking out probate, which affidavit is to set out the "estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estate for years of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the debts due and owing from the deceased." Then it provides that, "where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be," there shall be a return of the stamp duty: so that, before the probate is granted, the person taking the probate is to swear that the estate of the deceased is under a certain sum. This excludes anything *not the estate of the deceased*. It is not that the estate for which the probate is to be granted is under a certain sum, but the estate of the deceased for which it is granted. Unless the property was the property of the deceased, it is not liable to probate duty; for the act says it shall only be paid in respect of the estate and effects *of the deceased* in respect of which probate is granted. All the cases which have been cited are reconcilable with this view of the subject. In *Ex parte Cholmondeley*, the claim to probate duty was given up. Upon the claim for legacy duty, the Court decided that it attached; because there was a general power of appointment, which was executed, which it differs from this case. In *The Attorney-General v. Staff*, and *Palmer v. Whitmore*, the settlements

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were by deed. In *Pakner v. Whitmore*, the probability is that the settlor was the testator, and that he disposed of the property by his own will. That such was the case in *Ex parte Staff* is beyond controversy. In that case an estate for life, with a general power of appointment by deed or will, was given to Judith Staff. She executed it by deed in her lifetime. The moment she executed that power over it, she made it her own property. She transferred it to other trustees, to be held to other uses, to herself for life, with a power of disposition by deed or will; which she afterwards exercised by will. There, without doubt, the estate and effects for which probate was to be granted were the estate and effects of the deceased. No one could say that legacy duty was not payable in such a case; for the testatrix was disposing of her own property placed in the hands of trustees, who were bound to give it back to her if she called for it. The act says, that duty shall be paid in respect of the property of the deceased. If the property, being legally hers, is put into hands of trustees for her benefit, it remains her property. [*Parke, B.*—No; it is limited to her to such uses as she shall by deed or will appoint. *Rolfe, B.*—Suppose she had made her will, and said, I give my property to such and such persons, in case a particular event happens?] There would in that case have been a resulting trust. Where a power is created and executed, the appointee takes under the instrument creating the power. In *The Attorney-General v. Staff*, it is clear that the party took under the instrument by which the power was created. Judith Staff, by her will becoming incorporated into her own deed, appointed to that which was her own property. The legatees took by her will that which was her own property. The distinction taken by the Vice-Chancellor in *Vandiest v. Fynmore* was a sound one. There the effect of the execution of the power

was not to appoint to the property of the appointor, but that of the donor of the power; and the case is reconcilable on that ground with *The Attorney-General v. Staff*, and *Palmer v. Whitmore*.

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But even if the Court should think that the property in question was given generally to Mrs. Platt, and that it passed as such by her appointment, so that the appointees would be liable to legacy duty, still probate duty would not be payable under her will. In *Ex parte Cholmondeley*, where the claim to probate duty was given up by the Crown, the testatrix had a power of appointment under the marriage settlement, in case of her surviving her husband, by deed; and she executed the power during the life of her husband by will. Where a party has a power of disposing of property, and executes that power, it does not make it the party's own property for any purpose of the probate duty.

The main question, however, is, what legacy duty is payable; whether such legacy duty as if the appointees named in Mrs. Platt's will were ingrafted into the will of Mr. Ramsden; or whether the appointees are to be considered as the legatees of Mrs. Platt, and not the legatees of Ramsden. It is submitted that they are to be considered as the legatees of Ramsden only; and it being admitted that all the legacy duty that became payable in the lifetime of Judith Platt, treating her as legatee for life, has been fully paid, nothing is payable by the executors of Ramsden, by reason of the exercise of the limited power of appointment given to Judith Platt, except such duty as shall be payable by them in respect of legacies given by her, as legacies payable by Ramsden's executors, out of his estate. It is contended, on the other side, that, under the 18th section of the 36 Geo. 3, as soon as Judith Platt executed the power given to her, a further duty became payable as by her. It cannot be con-

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tended that this case falls within the description of a limited interest, with a general and absolute power of appointment; and it is only in cases where it is a general and absolute power, and that power is exercised, that the duty is so payable. A general and absolute power is that power which a party may exercise at any time, and in any mode, and in favour of any person he pleases, and by the exercise of which he may give to himself, in his own lifetime, absolute property. The distinction between general and limited powers is perfectly well known. In Sugden on Powers, 495, it is said, "An important distinction is established between general and particular powers. By a general power, we understand the right to appoint to whomsoever the donee pleases. By a particular power, it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is in regard to the estates which may be created by force of it, tantamount to a limitation in fee; not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so." A general power being one that a party may exercise when he pleases, in favour of whom he pleases, and how he pleases, it is a limited power if he be confined either as to the mode or the objects. A power to appoint by deed cannot be executed by will, and vice versâ; and a power to appoint to one class of persons cannot be executed by appointing to others. It is impossible here to say that Judith Platt had the entire and absolute control over this estate, or that she could do any thing more than appoint to the exclusion of the persons named, and therefore it does not come within the description of a general and absolute power. [*Rolfe, B.*—Do I understand you to

contend that no power of appointment is general, when it is limited to be executed by will—that, to be general, it should be to be executed by deed or will?] Certainly; if there is the power of disposing of it by will only, the donee can never have the full enjoyment under it. Where there is a general power, the donee may carry the estate into the market and dispose of it. The question is, whether the donee can, by executing the power, obtain the absolute possession of the property in his own lifetime. Where it is only to be executed by will, it is a limited power in the mode of its execution. It has been said that in this case the subject of the power would be assets in equity, and the property of the testatrix for the payment of debts; but no authority has been cited in support of that proposition. [Parke, B.—In *Ex parte Cholmondeley*, the donee had no power of acquiring the property beneficially.] There the attention of the Court was not drawn to the distinction, that she had the power, during the coverture, of appointing by will only, nor to the question whether anything is a general and absolute power by which the party is restrained from acquiring enjoyment in his lifetime; and it was considered that the power of appointing to anybody by will would have been for the purposes of that case a general power of appointment. It is impossible to read this will, without seeing that the testator was determined that his daughter should not have an absolute power of appointment; for he excluded families the most likely to be the objects of her bounty. It is a limited power, if it be restrained as to the mode, the time, or the object. That it is here limited as to the mode is clear, as it is to be exercised by will only, and it is restrained as to the objects also. According to the language of the statute, the will is to have effect and be satisfied “out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she

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shall think fit." That corresponds with the language of the 18th section, as to a general and absolute power of appointment, because the words "as he shall think fit" can scarcely be understood as being short of intending a general and absolute power of appointment, otherwise it might be contended that a gift to a particular class came within that definition, which it is clear it does not. It must be a general and absolute power, such as would enable the donee to enlarge the estate for life into a fee-simple interest, to make it subject to the larger duty. Now, to try whether Mrs. Platt could have dealt with this property as she thought fit, what would have been the effect of an appointment in favour of any of the persons named in the will? It is clear the gift over to the next of kin of Dyson Ramsden would have taken effect. It would be declared that she could not dispose of it as she thought fit. [Lord Abinger, C. B.—I understand the *Solicitor-General* to say, it is very true, if you take the literal construction, she would not have power to dispose of it as she thinks fit, because she is limited by the exception of three families; but if you look at the whole purview of the act, the question is, whether, when he gives her all the world to select from except three individuals or families, that is such a limitation of the power as is meant by the act of Parliament.] But as the question is whether this is an absolute power or not, it is not immaterial to shew that the persons named in the case, stand in a relationship that would make them the objects of Mrs. Platt's kindness, and that she was prohibited from giving the property to them. There are restraints imposed upon her, and yet it is contended that she is bound to pay the same duty as she would have done if there had been no restraint upon her. The question is, whether, in a case like this, where there are restraints that are real and not illusory, there would, as it is insisted on the other side, be a trust for creditors if the tes-

tatrix had any. No case has been cited, and none can be found, for such a position. In all cases where it has been so held, the power was absolute, and it was only in a certain mode made assets, and the executor had no power to interfere with it. But this property is no more personal assets of the deceased, than a freehold estate charged with debts either by will or by law.

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Simpkinson appeared for the executors of the original testator.

The Solicitor-General was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was a case directed by the Master of the Rolls for the opinion of this Court, as to the probate and legacy duties payable under the wills of John Ramsden and Judith Ann Platt, his daughter.

It appears that John Ramsden, by his will dated the 10th day of March, 1825, after giving various legacies, and directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter Judith Ann Platt, John Routh, John Sharman, and John Gillett, his executrix and executors, upon trust, to permit his said daughter to receive the interest and dividends thereof during her life, and after her decease (subject to certain payments then to be made), upon trust for such person or persons (other than and except Joseph Woodhead, of Russia Row, and his relations, Moses Hoper, of Dorset Street, and his relations, and the relations of the late husband of the said testator's said daughter, and every of them, in such parts, shares, and proportions, and in such manner and form, as the said Judith Ann Platt, whether sole or coverte, should by will

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appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden; and the testator declared, that in case his said daughter should intermarry with the said Joseph Woodhead or any of his relations, or should reside with or receive visits from him or them, then the bequests in her favour should utterly cease.

The testator died in the month of May, 1825, and his will was duly proved by his executrix and executors.

After the testator's death, the said Judith Ann Platt married George Edmund Platt, and the interest and dividends of the testator's residuary estate (which was very considerable) were regularly paid to her until her death, which happened on the 9th September, 1837.

Previously to her death (namely, on the 27th of April, 1837), she made a will, and thereby, in exercise of the power under her father's will, she gave £10,000 Consols to the descendants of the before-named Dyson Ramsden, and she gave all the rest of her late father's property to various persons, strangers in blood both to her father and herself. Dyson Ramsden was the son of a brother of John Ramsden, the testator.

The points on which the opinion of this Court is desired are these, as to the legacy duty payable in respect to the bequests contained in the two wills, and as to the liability of Judith Ann Platt's will to the probate duty.

This question, so far as regards the legacy duty, appears to us to depend entirely on the construction to be put upon the 18th section of the 36 Geo. 3, c. 52, which regulates the duty in cases where legacies are given subject to power of appointment. It will be observed, that the legislature in this section refers to two sorts of powers of appointment only: *first*, powers of appointment to or for the benefit of any person or persons specially named, or described as objects of the power; and *secondly*, general and absolute powers of appointment. It is plain, from the whole context of the act, that these two classes of powers were meant

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to include all possible cases ; and the question, therefore, is, under which class does the power now under consideration range itself. It does not literally come within either description. It is not a power to appoint for the benefit of persons *specially named or described*, for no persons are either named or described. It is not a general and absolute power; because there are certain persons and their families, in whose favour the power cannot be executed. In applying the provisions of the act to a case like the present, some violence, therefore, must be done to the language of the clause in question ; and, after much consideration, we think that there is less difficulty in treating this as a general and absolute power, than as a power to appoint for the benefit of persons specially named or described. The power is one which might have been exercised by Mrs. Platt solely for her own benefit. She might have contracted debts to any amount in her lifetime, and then by her will have directed the fund in question to be applied in their discharge ; nay, further, if she had died indebted, and had appointed the fund to strangers, the appointees could only have taken subject to her debts ; for the rule of equity, which subjects a fund so appointed to the debts of the appointor, does not appear to be affected by the circumstance, that there are certain persons to whom the fund could not have been given. The question in such cases is, not whether there are persons to whom the fund could not have been given, but whether the party executing the power might have executed it for his own benefit, i. e., in payment of his own debts ; and where that is the case, all appointees are held as volunteers, and as being in no better situation than ordinary legatees, taking by the bounty of the appointor, and subject to his debts. See the language of Lord *Hardwicke*, in *Lord Townshend v. Windham* (a).

(a) 2 Ves. sen. pp. 9, 10.

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Inasmuch, therefore, as the power given to Mrs. Platt is one which she might have exercised for her own benefit, and under an exercise of which no one can claim any right, except subject to her debts; and as it is impossible, without manifest absurdity, to treat the persons in whose favour she might appoint (namely, all mankind except three families) as being persons specially named or described; we think the power must be treated, according to the only other alternative in the 18th section, as a general and absolute power.

The same reasons which induced us to put this construction on the 18th section, also appeared to us to establish, that, according to the true construction of the 7th section, the property subject to the power was personal estate, which Mrs. Platt had power to dispose of as she should think fit.

With regard to the question of the probate duty, we are of opinion, that no duty is payable on the probate of the will of Judith Ann Platt, in respect of the residuary estate of her father. We are aware that this opinion is directly opposed to the decision of this Court in *The Attorney-General v. Staff* (a), as also to the previous case of *Palmer v. Whitmore*, before the Vice-Chancellor (b). But these cases both proceeded on the ground, that property subject to a general power of appointment forms part of the property "for or in respect of which the probate is granted;" and it appears to us impossible to reconcile that doctrine with the subsequent decision of the House of Lords, in *The Attorney-General v. Hope* (c). In that case, which was very fully considered, the House of Lords held, that probate duty was not payable in respect of such parts of the testator's assets as were situate

(a) 2 C. & M. 124.

(b) 5 Sim. 178.

(c) 1 C., M., & R., 530.

in America at the time of his death; and the broad ground on which that decision rested was, that probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate, being in fact that property which, but for the will, the ordinary would in early times have been entitled to apply in pious uses. Now, although Judith Ann Platt had what we consider an absolute power of appointment over the property in question; yet it is clear, that the ordinary never could, under any circumstances, have had any right whatever to interfere with it; and it is also certain, that, whether probate be granted or not, the executor, quâ executor, can have no title to any part of the property. Lord *Lyndhurst*, in delivering the judgment of the Court in *The Attorney-General v. Staff*, said, that that case, which was exactly similar to the present, came within the very words of the 38th section of 55 Geo. 3, c. 184. But that is in fact begging the whole question. The words of the 38th section are, that the person applying for probate shall make oath that the estate and effects of the deceased, *for or in respect of which the probate is to be granted*, exclusive of property of which the testator was possessed as trustee, and not beneficially, are under a certain sum. The question is, whether property circumstanced like the present, is property of the deceased, *for or in respect of which the probate is granted*; and the House of Lords having decided that the probate is granted in respect only of that property which, but for the will, the ordinary would have been entitled to administer; and it being quite clear, that neither the ordinary nor the executor ever could have administered any part of this property; we cannot hold that this is property for or in respect of which the probate is granted.

It might be sufficient for us to stop here: to say, that as it appears to us impossible to reconcile *The Attorney-*

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Lords, we are bound to act on the latter authority. But it is right we should also add, that, even independently of the authority of the case in the House of Lords, there would be many serious difficulties resulting from the doctrine of *The Attorney-General v. Staff*, which do not seem to have occurred to the Court when that case was decided. The executor is the party who is to pay the duty, and the only funds to which he can resort for reimbursement are the general assets. What then is he to do in a case like the present, where the fund to be appointed is very large, and the general assets very small? It may, and probably in the present case would, happen that the duty would far exceed the whole of the assets, which the executor can ever possess. The consequence would be, that he never would be able to prove at all. In the 45th and following sections of the 55 Geo. 3, c. 184, provision is made for enabling the Commissioners of Stamps to grant probate on credit, where the assets realized are not sufficient to enable the executor to pay the duty. But in such case, the full amount is made a debt due from the executor; and it is plain from the nature of the provisions, that the legislature did not contemplate the possibility of a case in which the duty could ever eventually exceed the amount of the assets realized by the executor; as it certainly may, if the doctrine in *The Attorney-General v. Staff* is followed.

How is the duty on the appointed fund to be obtained, in a case where the general assets are in one province, the province of Canterbury for instance, and the appointed fund in another, the province of York? The executor proving in the province of Canterbury, would certainly not be bound to pay duty on the appointed fund; and the act contains no provision obliging him, in such case, to prove at all in the province of York. The legislature

could hardly have meant, that the liability of the appointed fund to probate duty, should depend on the accident of its being, or not being, situate in the same province with the general assets.

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Again, suppose the case of the appointed fund being in a foreign country, it can hardly be contended, after *The Attorney-General v. Hope*, that in such a case probate duty would be payable; and yet there is no more reason why it should not be payable then, than where the funds are in England; for in neither case would the probate give any right to the executor.

The language of the Court in *The Attorney-General v. Staff* is—"The property by the execution of the power of appointment became liable to her debts, and became her personal estate; she had an absolute control over it." If this be the correct test as to the liability to probate duty, it will include the case of a power to appoint a sum to be raised out of real estate, as well as the power to appoint personal estate; and surely it would be a strange anomaly, that probate duty should be payable in respect of a charge on real estate, created by virtue of a power, when it is clear no such duty is payable where the charge is created by the owner of the fee-simple.

We have pointed out these incongruities (and many more might be suggested) for the purpose of shewing, that, in following the principle established by the case of *The Attorney-General v. Hope*, we are taking the course, not only consistent with the decision of the House of Lords, but also, as it appears to us, most conformable to the spirit and intention of the act.

It will be observed, that, according to our view of this subject, the Vice-Chancellor was right in the case of *Van-diest v. Fynmore (a)*, which was after the case of *The At-*

(a) 6 Sim. 570.

Exch. of Pleas, 1840. *torney-General v. Staff*, in holding that probate duty was

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not there payable. But we feel bound to add, that we do not concur in the reasons in which his Honor is represented as considering that case distinguishable from those which had preceded it.

On these grounds, we propose to return the following certificate in answer to the questions submitted to us by the Master of the Rolls:—

First. We are of opinion, that, on the death of Judith Ann Platt, a duty of one per cent. became payable in respect of the bequest in the will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof.

Secondly and thirdly. We are of opinion that, no probate duty is payable upon the probate of the will of the said Judith Ann Platt, in respect of the estate and effects bequeathed and appointed by her said will as aforesaid.

Fourthly and fifthly. We are of opinion, that legacy duty is payable in respect of the bequests contained in the will of the said Judith Ann Platt, at the same rate at which it would have been payable, if they had been mere legacies given by her, payable out of her own personal estate.

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TRESPASS for breaking and entering a close of the plaintiffs, situate at the parish of Newton, in the county of Lincoln, (describing its abutments), and pulling down posts and rails standing thereon, &c.

The defendant, by his fourth plea, alleged an enjoyment for twenty years next before the commencement of the suit, by the respective occupiers for the time being of a close called the Breast Field, situate in the parish aforesaid, and adjoining to the said close in which &c., of a general right of way from the Breast Field towards, unto, into, through, over, and along the close in which &c., and from thence unto and into a common Queen's highway, and back again, &c., on foot, with cattle, and with carts, waggon^s, and other carriages, &c.; and justified the trespasses in exercise of such right of way. The fifth plea alleged the existence of a common and public highway into, through, over, and along the close in which &c., for the purpose of fetching, drawing, loading, and taking away all such lime and coal, and other materials, as might be landed on a certain public landing-place adjoining the said close in which &c., and a certain public navigable river called the river Trent,

To an action of trespass *qu. cl. fr.*, the defendant pleaded a right of way across the locus in quo for the occupiers of B. field, on foot and with cattle and carriages, enjoyed as of right and without interruption for twenty years before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71. The replication traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of Parliament (the Trent Navigation Act, 23 Geo. 3, c. 48) under which the Trent Navigation Compa-

ny, before the commencement of the twenty years, made a halting-path for towing vessels along the river, across the locus in quo, into B. field; that after the commencement of the twenty years, under the powers of another act of Parliament (the Dunham Bridge Act, 11 Geo 4, c. lxvi.), another halting-path was set out nearer to the river, but also across the locus in quo and into B. field, and that thereupon the Navigation Company abandoned the former halting-path, which thenceforth ceased to be used as such: that, before and at the commencement of the twenty years, the occupiers of B. field used and enjoyed, as of right and without interruption, by virtue and under the provisions of the first act of Parliament, a way along the first-mentioned halting-path, across the locus in quo, on foot and with cattle, which right of way ceased and determined on the abandonment of that halting-path: but that, from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way, as a continuation of the right before enjoyed by them under the act of Parliament, continued to use the same way; which way, and the use and enjoyment thereof along the halting-path as aforesaid, is the same way, and the same use and enjoyment thereof as in the plea mentioned, except as to the user with carriages:—*Held*, on demurrer, that the replication was good: that it disclosed facts shewing that the defendant's user, although as of right and without interruption during the twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, ss. 2 & 5, was not such as would, before that statute, have been sufficient to prove a claim by prescription or non-existing grant: and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea.

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from boats, barges, and other vessels in the said river, and justified the trespasses in the use of such highway, for the purpose of fetching &c., lime, coal, and other materials which, just before the times when &c., had been landed on the said landing-place from boats, barges, and other vessels in the said river.

Replication to the fourth plea, as to so much thereof as relates to the allegation of a right of way with carts, waggons, and other carriages, and to the exercise of the way with carts, waggons, and other carriages, traversing such right. And as to the residue of the plea, that, after the making and passing of a statute made and passed in the 23rd year of the reign of his Majesty King George the Third, intituled "An Act for improving the Navigation of the River Trent, from a place called Willden Ferry, in the counties of Derby and Leicester, or one of them, to Gainsborough, in the county of Lincoln, and for empowering persons navigating vessels thereon to hale the same with horses" (a), and before the commencement of the said period of twenty years in the said fourth plea mentioned, to wit, on the 1st day of January, 1785, the company of Proprietors of the River Trent Navigation, in the said act mentioned, and by virtue of and according to and in pursuance of the said act, did set out, and from thence until the abandonment thereof hereinafter mentioned, did use, a certain convenient and sufficient path for haling, towing, and drawing, by men or with horses, any boats,

(a) 23 Geo. 3, c. 48: the 92nd section whereof enacts, "That all owners and occupiers of lands through which the said haling-path shall be made, shall have free liberty to use the said haling-path as a foot-way, bridle-way, or drift-way for their cattle, to, from, or through their respective lands, and to or from their proper watering places at the said river: ...and all

persons authorized to use the said haling-path, by themselves or with horses (not drawing), or other cattle as aforesaid, shall be liable to the like penalties and forfeitures for any trespasses or neglects hereinbefore specified, or owners, or drivers, or horses, employed in haling boats, &c., are subject to by virtue of this act," &c.

barges, keels, or other vessels using the said navigation; which said path was a certain path from and out of the said common highway towards, unto, into, and through the said close in which &c., unto, into, and through the said close called the Breast Field. And the plaintiffs further say, that afterwards, and since the commencement of the said period of twenty years in the said fourth plea mentioned, and before the first of the said times when &c. in the declaration mentioned, and after the passing of a statute made and passed in the 11th year of the reign of King George the 4th, intituled "An Act for building a Bridge over the river Trent, from Dunham, in the county of Nottingham, to the opposite shore in the county of Lincoln," (11 Geo. 4, c. lxvi.), to wit, on the 1st day of January, 1838, the Durham Bridge Company, in the said secondly recited act mentioned, did, under and by virtue and in pursuance of the said last-mentioned act of Parliament, for the length of sixty yards next to the Dunham Bridge in the said act mentioned, being part of the length of the path next hereinafter mentioned, set out and make, and the said Company of the Proprietors of the River Trent Navigation did, under and by virtue and in pursuance of the first-mentioned act, for the residue of the length of the path next hereinafter mentioned, set out and make, and the last-mentioned Company have from thence hitherto used and maintained, one other sufficient and convenient path, nearer than the said first-mentioned path to the said river, for haling, towing, or drawing by men or with horses, any boats, barges, keels, or other vessels using the said navigation; the said secondly mentioned path being so made as aforesaid in a continuous line from and out of the said highway towards, unto, into, and through the said close in which, &c., unto, into, and through the said close called the Breast Field: and the said Company of Proprietors of the River Trent Navigation did thereupon, after the said secondly mentioned path had been so set out and made as aforesaid,

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and within twenty years next before the commencement of this suit, and before the first of the said times when &c. in the declaration mentioned, to wit, on the day and year last aforesaid, wholly abandon the said first-mentioned haling-path, which thereupon did cease, and from thence hitherto hath ceased, to be or to be used as such haling-path as aforesaid; and from the time of the said abandonment of the said first-mentioned haling-path hitherto, the said secondly mentioned haling-path hath been and still is the only haling-path to, from, through, or in the said close in which &c., and also the only haling-path, to, from, through, or in the said close called the Breast Field. And the plaintiffs further say, that before and at the time of the commencement of the period of twenty years in the said plea mentioned, until the said abandonment of the said first-mentioned path, the occupiers of the said close called the Breast Field actually had, used, and enjoyed, and were respectively accustomed to have, use, and enjoy, as of right and without interruption, by virtue of and under the provisions of the said first-mentioned act, but not under any other right or title, a way in and along the said first-mentioned haling-path, for themselves and their servants to go, return, pass, and repass, on foot and with horses, mares, geldings, sheep, and cattle, from the said close called the Breast Field towards, unto, and into, through, over, and along the said close in which &c., and from thence unto and into the said highway, and so from thence back again, from the said highway towards, unto, into, and through the said close in which &c., unto and into the said close called the Breast Field, every year and all times of the year, at his or their free will and pleasure, as to the said close called the Breast Field belonging and appertaining: which said right of way, during the period of twenty years in the said fourth plea mentioned, and before the first of the said times when &c. in the declaration mentioned, ceased and determined upon and by virtue of the said making of the said secondly

mentioned haling-path, and the said abandonment of the said first-mentioned haling-path. And the plaintiffs further say, that from the time when the said first-mentioned haling-path was so abandoned as aforesaid, and ceased to be such haling-path as aforesaid, until the commencement of this suit, the respective occupiers for the time being of the said close called the Breast Field, claiming right to the way hereinafter mentioned, as and by way of a continuation of the said right so by the respective occupiers for the time being of the said close called the Breast Field, by virtue of and under the provisions of the said first-mentioned act, previously had, used, and enjoyed as aforesaid, continued to use and enjoy, and were respectively accustomed to use and enjoy, and had actually had, used, and enjoyed, as of right and without interruption, in and along the said first-mentioned haling-path, the same way as aforesaid [describing it as before]: And the plaintiffs further say, that the said way, and the said use and enjoyment thereof in and along the said first-mentioned haling-path, was and is the same way, and the same use and enjoyment thereof, as the way, and the use and enjoyment thereof, in the said fourth plea mentioned, except so far as the plea alleges the same to be a way for carts, waggons, and other carriages, and not another or a different way, use, or enjoyment, and that there was no origin, title, or ground for the said alleged right of way, so far as the same does not relate to carts, waggons, and carriages, which was so used and enjoyed as in the said fourth plea and in this replication mentioned, except the said first-mentioned act of Parliament.—Verification.

The defendant, as to so much of this replication as related to the allegation in the plea of the right of way with carriages, joined issue thereon: and as to the residue of the replication, demurred specially, assigning for causes, that the said replication is double, in this, that it states several distinct and material issues: that the plaintiffs ought either to have traversed the matters contained in the

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fourth plea, or to have confessed and avoided such matters; that the plaintiffs have in their replication set out another and different right of way, and averred it to be the same right of way and identical with that claimed by the defendant in his said fourth plea, as to the said close called the Breast Field belonging and appertaining; and that the said replication is argumentative, and no certain or specific issue can be taken thereon, &c. The following point was also stated in the margin:—That the right of way in the fourth plea and in the introductory part of the said replication mentioned, did not cease by the setting out and making of the said haling-path by the Dunham Bridge Company of Proprietors of the River Trent Navigation, as in the replication mentioned.—Joinder in demurrer.

To the 5th plea, the plaintiffs new assigned, that they issued their writ, &c., not only for the several trespasses in the introductory part of the said 5th plea mentioned, and therein attempted to be justified, but also for that the defendant, on the said several days and times &c., broke and entered the said close of the plaintiff, &c. &c., which are other and different trespasses than the said trespasses in the said 5th plea mentioned, and therein attempted to be justified, &c.

Plea to the new assignment, setting up the same right of way as alleged in the 4th plea: to which there was a replication in the same terms as the replication to the 4th plea, which was followed also by a similar joinder of issue, demurrer, and joinder in demurrer.

The case was now argued by

Bayley for the defendant, in support of the demurrer.—The replications are bad: they do not in any way meet the right set up by the pleas. The defendant claims a general right of way, on foot, and with cattle and carriages, from the Breast Field, over the plaintiff's close, into a highway, and back again. The plaintiffs, in answer to this claim, after traversing the right so far as it is claimed to

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be used with carriages, set forth an act of Parliament, under which they say a haling or towing path was set out by the Trent Navigation Company, before the commencement of the period of twenty years mentioned in the pleas, and another act under which that path was discontinued as a haling-path and another made and used instead of it, within the twenty years; and then allege that the occupiers of the Breast Field continued to use the former after its abandonment, and that the way so used is that alleged in the pleas; and that the defendant has no other right except under the act of Parliament. But that is not the right claimed by the pleas; what they claim is a drift-way in respect of the occupation of the Breast Field. The plaintiffs ought to have traversed the right of way as alleged. Again, the replication does not shew that the defendant has any connexion with the Trent Navigation Company, but only that he has in fact used the path. [*Alderson*, B.—What is the replication but a denial of the defendant's user as of right?]
Yes—but it is an argumentative instead of a direct denial. [*Lord Abinger*, C. B.—It seems to me that the plaintiffs should, at all events, have shewn in their replication that the right of the defendant was connected with the user of the towing-path under the act: that, however, would only have been an argumentative denial of the right alleged.]—The Court then called on

Waddington to support the replications.—The question in this case turns on the construction of the Prescription Act, 2 & 3 Will. 4, c. 71, and it becomes necessary to refer to that act, and to the cases decided on it, to shew that, in the present case, the plaintiffs could not have pleaded otherwise in confession and avoidance of the pleas. The 2nd section of the act provides, that no claim to any way or other easement, &c., when it shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be

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defeated or destroyed by shewing only that it was first enjoyed at any time prior to such period of twenty years, &c. Then the 5th section prescribes the mode of pleading and replying to such rights:—enacting, “that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act, as may be applicable to the case, &c.; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, &c., or on any cause or matter of fact or of law, *not inconsistent with the simple fact of enjoyment*, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.” Now, here the facts alleged in the replication, are consistent with the simple fact of enjoyment by the defendant, as of right and without interruption. It confesses a user of twenty years; but shews that, before the commencement of the twenty years, a certain state of things existed which gave rise to and authorized that user; that that state of things ceased to exist within the twenty years; but that the defendant’s user, notwithstanding continued. It admits an *adverse* enjoyment down to the commencement of the suit—but an enjoyment originating under the authority of the act of Parliament, and in no other right. It is clear, that up to the period of the abandonment of the first haling-path, this was a strictly rightful enjoyment, under the 23 Geo. 3, c. 48, s. 92: then the replication goes on to state a continuance of the user after such abandonment; but it cannot be said that the same right which existed only by virtue of a kind of parliamentary contract between the owners of the land and the

Canal Company,—could continue after the legal abandonment of the way by the latter. When the land could not be otherwise used, it was reasonable that the way should be enjoyed; but inasmuch as, by the act of parliament (a), the *soil* of the haling-path remained in the owner of the land, why should the *easement* continue, when it was no longer used as a haling-path, and the owner had it in his power to resume all his original rights? It reverted to him free from the easement, which was no longer necessary. This is not such a user as could have been inferred from prescription or a lost grant before the act; but the circumstances disclose (in the words of s. 2,) “a way in which the easement is defeated, other than by shewing that it was first enjoyed before the twenty years;” and therefore they may be given in evidence to defeat it,—but not without pleading them. There is a user throughout, “as of right, and without interruption:” first, under the act of Parliament, and then as an adverse enjoyment claimed in continuation of the former right. No doubt, if the latter had continued for twenty years, it could not have been avoided. In *Bright v. Walker* (b), the qualities of the enjoyment necessary to clothe the party with the right, under this statute, were fully considered. *Parke, B.*, says—“In order to establish a right of way, and to bring the case within this section, (s. 2), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so ‘as of right,’ for that is the form in which (by s. 5) such a claim must be pleaded; and the like evidence would have been required before the statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall

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(a) 23 Geo. 3, c. 48, s. 25.

(b) 1 C., M., & R. 211.

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have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' The same doctrine is laid down in *Tickle v. Brown* (a), and *Beasley v. Clarke* (b). The enjoyment necessary to give a title, therefore, does not mean enjoyment *adversely*, but enjoyment *openly*, without force or fraud—*nec vi, nec clam, nec precarie*. [*Alderson*, B.—You say you could not safely traverse the right, because there has been a continuous adverse user for the whole period.] Yes—a continuous user as of right; but which is shewn, by the facts averred in the replication, not to be such as that a title by prescription or lost grant could be inferred from it. Then is it sufficiently avoided? It clearly is, if the right ceased on the abandonment of the haling-path; which is a matter to be replied, because it does not, like leave asked, break the continuity of the twenty years' user, but is consistent with it. The plaintiffs admit that the defendant's user was an enjoyment under a claim of right, (which is what is meant in s. 5,) although not such as to confer a right in law, when inquired into. This is, in truth, an agreement beginning before the commencement of the twenty years, but extending over only a part of that period. Unity of possession for a part of the time may be shewn under the general traverse; because, there the easement is not enjoyed as an easement: *Onley v. Gardiner* (c). [*Lord Abinger*, C. B.—Was it necessary to do more than to put upon the record the right under which the defendant was entitled, and the determination of it?] At all events, the rest of the replication is only surplusage. It is objected that an issue could not be taken on it; but the defendant might have denied the abandonment, or that his right was solely under the act. Then it is said the replication is

(a) 4 Ad. & Ell. 382; 6 Nev. & (b) 2 Bing. N. C. 705; 3 Scott, 258.
M. 230. (c) 4 M. & W. 496.

double; but it only consists of a number of facts making up one defence. Again, it is said that it sets out a different way from that stated in the plea; if so, the defendant should have traversed it.

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Bayley, in reply.—It may be admitted that the replication *confesses* the user as of right; but it does not *avoid* it. It avers that the original haling-path has ceased; but it does not state that the act of Parliament is repealed; nor is any connexion shewn between the occupier of the Breast Field and the Trent Navigation Company. Further, the Dunham Bridge Act does not expressly substitute the new for the old haling-path. The argument for the plaintiffs amounts to this, that the discontinuance of it as a haling-path by the Company necessarily deprived the defendant of his right. But if so, the general traverse would have been sufficient, and the plea, being divisible, might have been found partly for the plaintiff and partly for the defendant: *Higham v. Rabett (a)*. If this replication amounts to anything, it is to the statement of a different right of way from that which the defendant has claimed.

LORD ABINGER, C. B.—I am of opinion, on consideration, that the replication is sufficient. If the plaintiffs had simply traversed the right as alleged, and then shewn on the trial the facts as they are set forth in the replication, the answer would have been, that they ought to have been pleaded, because they admit a continued adverse user during the twenty years. The replication is not vitiated by the admission of the right during a part of the time; it is only putting on the record more than is necessary. Here the plaintiffs have confessed the whole, and avoided the whole. Another question arises, as to whether the right given by the act to use the haling-path has ceased. That is a question of

a) 5 Bing. N. C. 622, 7 Scott, 827.

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law, and if the plaintiffs have failed to shew that, they have shewn nothing. I am of opinion that it has ceased. [His Lordship read the 92nd section.] The intention of the act was, that, so long as there was a haling-path, the owners and occupiers of the land over which it passed should have a right to use it, and no longer. I think, therefore, that the plaintiffs are entitled to judgment.

ALDERSON, B.—I am of opinion that the proper construction of Lord *Tenterden's* act is that for which Mr. *Waddington* has contended. If a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave given be from time to time within the twenty years. The 5th section creates the difficulty. The act, however, does not alter the nature of the right necessary to give a legal title. The party who avers the right must mean such as could be inferred to exist by custom, prescription, or non-existing grant: and the other party must shew in his answer that there is no right of that nature. Here the replication states, that, within twenty years before the commencement of the suit, the haling-path was shifted, and the previous one abandoned. If so, according to the act of Parliament, the defendant's right to use it ceased. So that the replication shews that the defendant could not have exercised the right either by custom, prescription, or grant, and is therefore sufficient.

GURNEY, B., and ROLFE, B., concurred.

Bayley then applied for leave to amend, by pleading that the defendant had enjoyed the right for *forty* years.

Leave to amend on payment of costs; otherwise,
Judgment for the plaintiffs.

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GRIPPER and Others v. BRISTOW (a).

KELLY had obtained a rule to shew cause why the warrant of attorney given by the defendant in this action should not be set aside, and why the writ of fieri facias issued herein should not be set aside for irregularity; on the ground that the warrant of attorney was not duly attested according to the stat. 1 & 2 Vict. c. 110, s. 9.—The affidavit of the defendant (an innkeeper at Hertford), on which the application was founded, stated, in substance, that, in consequence of an application by the plaintiffs to him for some security for his debt to them, it was agreed that he should sign a warrant of attorney for £250, and the plaintiffs undertook to give instructions to Mr. Prangle, their attorney, to prepare it: that, on the 25th April last, Prangle called on the defendant, and told him that “he had prepared the thing to be signed by him,” and requested him to call at his office for the purpose, and an appointment was made accordingly for 8 o’clock that evening; but before that hour, Prangle called on the defendant with the warrant of attorney, and stated that it must be signed in the presence of some professional man, and that he should procure Mr. Edward Robert Spence to attest it; and accordingly he took with him the warrant of attorney for the purpose of procuring Mr. Spence’s attendance: that the defendant afterwards attended at Prangle’s office, and executed the warrant of attorney in the presence of Prangle and Spence, whom Prangle had

The defendant having agreed to give the plaintiffs a warrant of attorney to secure his debt to them, the plaintiffs employed P., an attorney, to prepare it. P. called with it on the defendant, and told him it must be signed in the presence of some professional man, and that he should procure Mr. S. to attest it; and the defendant accordingly went to procure S.’s attendance, but met him in the street, when P. told him they were coming to his, S.’s, office, that he might witness the execution of a warrant of attorney by the defendant. The defendant then suggested that they had better go to P.’s office, which was nearer. They went there accordingly; P. placed the paper in S.’s hands, and

S. then read over and explained the warrant of attorney to the defendant, and asked him whether he wished him to witness the execution of it as his attorney. The defendant replied that he did, and then signed it, and S. attested it. P. offered to pay S. for his attendance, but he said, as it would come out of the defendant’s pocket, he should make no charge; for which the defendant expressed himself obliged:—*Held*, that S. was not expressly named by the defendant, and attending on his behalf, so as to satisfy the stat. 1 & 2 Vict. c. 110, s. 9; and the warrant of attorney and judgment signed thereon were set aside.

Seemle, that this is an objection which cannot be waived by the defendant.

(a) This case was decided by *Alderson, B.*, sitting alone on the last day of the term.

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so of his own accord procured to attend for the purpose of attesting it : that Prangley placed the warrant of attorney in Spence's hands, without the defendant's having previously consulted Spence on the subject, and without his having himself read the warrant of attorney : that Prangley, after the execution of the warrant of attorney, offered to pay Spence for his attendance, but he declined making any charge for it. The defendant deposed also, that, if he had been allowed to use his own discretion in the nomination of an attorney to attest his execution, he should have employed a Mr. Sworder, to whom he was under obligations, and who resided very near him, and whom he had consulted on all former occasions ; that Spence was expressly named by Prangley, and not by him the defendant ; and that he believed that Prangley, knowing that the defendant was indebted to Sworder, engaged Spence to attend in order that Sworder might not be informed of the nature of the security which the defendant was required to sign. On the 13th May, judgment was signed under the warrant of attorney, and execution issued. The present rule was obtained on the 9th of June.

The affidavit of Spence, in opposition to the rule, stated, that in the evening of the 25th April, he met Prangley in the street of Hertford, in company with the defendant, with whom he was well acquainted, when Prangley stated to him, in the defendant's hearing, that they were coming to his, Spence's, office, that he might witness the execution of a warrant of attorney by the defendant ; that the defendant suggested that they had better go to the office of Prangley, which was nearer ; that the deponent accordingly went with them to Prangley's office, and there read over and explained the warrant of attorney to the defendant, and asked him whether he wished him, the deponent, to witness the execution of it as attorney for him the defendant, to which he replied that he did ; and the deponent witnessed it accordingly : that Prangley offered to pay the

deponent for his attendance; but he said that, as it would come out of the defendant's pocket, he should make no charge, and the defendant thereupon expressed himself much obliged to the deponent. No affidavit was produced from Prangley, but it was sworn that he had left Hertford in consequence of pecuniary embarrassments, and that the plaintiffs were unable to have any communication with him, or to procure an affidavit from him.

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R. V. Richards and *Bramwell* shewed cause against the rule.—First, the attestation by Spence was sufficient to satisfy the statute. It is not sworn by the defendant that he had no previous communication with Prangley, and the statement of Spence, that he met the defendant coming to his office for the purpose, is a contradiction of what the defendant intended should be inferred from his affidavit, viz., that the calling in of Spence was entirely the act of Prangley. Then it appears that the defendant, on being asked by Spence whether he wished him to attest the instrument on his behalf, answered in the affirmative, and so clearly adopted him as his attorney. This case is not distinguishable from those of *Oliver v. Woodruffe (a)*, *Bligh v. Brewer (b)*, and *Taylor v. Nicholls (c)*. These cases establish, that from whatever quarter the suggestion of the attorney's name comes, if there be any expression of the defendant, shewing affirmatively that he recognises him as his attorney for the purpose, it is sufficient. [*Alderson*, B.—There does not appear to have been an exercise of any option in the present case; it looks like an express naming by Prangley. The difficulty arises from that part of the defendant's affidavit being left unanswered. Suppose Prangley had made an affidavit, and admitted that part of it?] It is consistent with all the defendant states, that

(a) 4 M. & W. 650.

(b) 1 C., M., & R. 651.

(c) Ante, p. 91.

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he did expressly assent to the nomination of Spence as his attorney. It was in effect an attendance at the request of the defendant; he had the option of answering in the negative to Spence's question. If the party has an election at any time before the irrevocable act of signature, it is sufficient.

But further, this is an irregularity only, and the plaintiff has waived it by his delay in making this application. If he had applied earlier, the plaintiffs might have agreed to set aside the instrument, and have proceeded against him on the original consideration. [*Alderson, B.*—If the warrant of attorney be void under the statute, the plaintiff has signed judgment without authority; how can it be waived? it is the same as if a stranger had signed judgment.] [They argued also, that the defendant had waived the invalidity of the warrant of attorney, by a subsequent arrangement with the sheriff for the sale of his goods.]

Kelly (with whom were *Knowles* and *W. H. Watson*) *contrà*.—It is an entirely new principle of law, that a non-compliance with a statute can be waived or cured. This is no *irregularity* within the meaning of the rule of *H. 2 Will. 4*; it is the signing of a judgment on a void instrument, *i. e.* without authority, and, for this purpose, by a mere stranger. Such a defect as that cannot be cured. In a recent case in the Court of Queen's Bench, an annuity was set aside for want of enrolment, after a lapse of 27 years. Where a statute requires certain forms to give validity to an instrument, if they be not observed, the instrument is void, and must be set aside at any time if the Court be satisfied that the statute has not been complied with. If it were otherwise, parties might always defeat the statute by swearing to some supposed assent or waiver, which could not be contradicted.

With regard to the other point, it has always been held

that the statute must be strictly and substantially complied with, for the benefit of the debtor; *Rice v. Linstead* (a). The words "expressly named" are used in contradistinction to a naming by implication from the circumstances: *Taylor v. Nicholls*. Here there was no naming by the defendant, either express or implied. The defendant positively swears that Spence was not named by him, but expressly named by Prangley; and where the party thus brings himself directly within the words of the statute, the Court will call for some direct contradiction on the other side: here there is none. It is consistent with the whole of Spence's affidavit, that the plaintiffs themselves had named him; and Spence is called upon actually to attest, before there is anything to shew any nomination or assent by the defendant. Prangley, although he informs the defendant that a professional man must attest the execution of the instrument, does not tell him that he is to be named by the defendant, and attending on his behalf. *Barnes v. Pendrey* (b) is in point, where *Cole-ridge, J.*, distinguishes the cases cited on the other side. Again, with regard to the "attending at the request" of the defendant, the cases cited are distinguishable. In all of them the defendant himself went voluntarily to the attorney for the purpose; here he went with Prangley to his office, and there Spence was introduced by Prangley. [*Alderson, B.*—*Walker v. Gardner* (c) is much nearer to this case than any of those which have been cited, and is a case à multo fortiori to the present.] If this be held sufficient, the plaintiff's attorney might always introduce an attorney of the plaintiff's own nomination, and if the question were only asked—"Do you wish me to attest as attorney for you?" and an affirmative answer were given, it would be enough.

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(a) 6 Scott, 895; 7 Dowl. P. C. 153.

(b) 7 Dowl. P. C. 747.

(c) 4 B. & Adol. 371.

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ALDERSON, B.—I think this rule must be made absolute. The true rule appears to me to be this: that, in order to make the party an attorney expressly named by the defendant, and attending on his behalf, there must be something different from what may be called an *implied* naming, or *implied* attendance, i. e., where it is to be collected only from the circumstances of the case that the attorney was named by or attending on behalf of the defendant. There is another criterion: that he be expressly named, or expressly attending, under such circumstances as to shew that the defendant is cognizant of the fact, and that he has an option in the matter. It is not necessary that he should *beforehand* name or request the attendance of the attorney, if, with full knowledge that he has an option, he adopts him as his attorney. That I take to be the rule established in *Bligh v. Brewer* and *Taylor v. Nicholls*. In those cases the defendant was informed that he had an option. In *Bligh v. Brewer*, his answer shewed that it was present to his mind that he could exercise an option, and that he did exercise it with his free will. In *Taylor v. Nicholls*, the defendant was expressly informed that he had a right to appoint any person, and answered that he had no wish to have any particular attorney, his only desire being that the transaction might not become known. There, also, he knew he had an option, and exercised it. In *Barnes v. Pendrey*, the defendant had a full option; but it was not shewn that he expressly adopted the party as his attorney. Here all the transaction apparently arose out of an application by the plaintiff's attorney to Mr. Spence. If the defendant had expressly adopted him, the case would have fallen within those of *Bligh v. Brewer* and *Taylor v. Nicholls*; but he does not appear to have known that he had an option to select an attorney on his behalf. The original information came from the plaintiff's attorney, and it did not communicate that the defendant had the right, but rather implied that the plaintiffs had. This statement is not con-

tradicted, and therefore I cannot but presume it true. Then, if the defendant merely answered Spence's question in the affirmative, under the impression that Prangley had a right to nominate, how can it be said, unless the act of Parliament is to mean nothing, that Spence was an attorney "expressly named by the defendant, and attending on his behalf," when he is originally suggested by Prangley, is expressly named by him, and only attests by the mere assent of the defendant. It appears to me, therefore, that the objection is well founded, and that this warrant of attorney is invalid.

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But it is said the objection has been waived. In the first place, the warrant of attorney being without validity, and the judgment therefore signed without authority, it is a strange thing to say that it can stand;—not merely by reason of an ordinary irregularity, but because the foundation on which it rests is wholly without validity. Without, however, saying positively that the defect may not be waived, the circumstances do not justify the conclusion that it has been waived in the present instance. The rule must therefore be absolute.

Rule absolute.

—◆—
PYLIE v. STEPHEN.

THIS was an action of assumpsit for the breach of a warranty of soundness of a horse. The declaration was in the usual form, containing a general allegation that the horse was unsound.

In an action for the breach of warranty of a horse, the Court will not order the plaintiff to give particulars of the unsoundness complained of.

Ball, for the defendant, moved for a rule to shew cause why the plaintiff should give particulars of the unsoundness, upon an affidavit stating that the defendant was not aware of the nature of the unsoundness complained of. He urged that particulars were as necessary for the infor-

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PER CURIAM.—We cannot grant such an application. It would be very unfair to the plaintiff to confine him to a particular statement of the cause of unsoundness. Though it may be clear that the horse is not sound, there may be some difficulty in saying in what the unsoundness consisted. Two or three veterinary surgeons might have been called in, who might all agree as to the defect, but differ as to the cause of it. The object of a bill of particulars is to give a better statement of the cause of action; but if we granted this application, it might in effect amount to a stay of proceedings.

Rule refused.

SYMES v. AMOR.

Where, in answer to a rule for judgment as in case of a nonsuit, the plaintiff deposed that since action brought he had been informed by the defendant's neighbours, and which he believed to be true, that the defendant was insolvent:—*Held*, that this was not sufficient to compel the defendant to accept a *stet* processus, but that the defendant was intitled to a peremptory undertaking.

GRAY shewed cause why a rule for judgment as in case of a nonsuit, on an affidavit of the plaintiff, which stated, that at the time the action was brought, the plaintiff had reason to believe that the defendant was in good and solvent circumstances: but that he had lately been informed by the defendant's neighbours, and which information he believed to be true, that the defendant was in insolvent circumstances, and had declared, that if the plaintiff should recover judgment against him, he would go to prison, and take the benefit of the Insolvent Debtors' Act.—Under these circumstances, the defendant ought to be compelled to accept a *stet* processus.

Best, *contra*, insisted, that as the plaintiff spoke only to his belief from hearsay information of the defendant's insolvency, the affidavit was not sufficient to entitle him to a

stet processus, but that he ought to give a peremptory undertaking.

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ALDERSON, B.—I think, that as the plaintiff speaks only from hearsay, and to his belief, he has not entitled himself to a stet processus.

Rule discharged on a peremptory undertaking.

The MAYOR, ALDERMEN, and BURGESSES of the Borough
of LUDLOW v. CHARLTON, Esq.

COVENANT.—The declaration stated a demise dated the 25th day of March, 1820, by the bailiffs, burgesses, and commonalty of the borough of Ludlow, of certain lands called the Foldgate Farm, to the defendant, for a term of twenty-one years, at a yearly rent of £150, and a covenant by the defendant for payment of such rent. Breach, in nonpayment of arrears of rent, to the amount of 375*l.* 13*s.* 5*d.* Pleas, 1st, payment; 2ndly, a set-off for £500, agreed to be paid by the corporation to the defendant, for pulling down and altering the site of a house called the Charlton Arms, in the town of Ludlow, and for altering a roadway there, and also for work, labour, and materials, and for money lent; 3rdly, a special plea, stating in substance that it was agreed between the old corporation of Ludlow (before the passing of the 5 & 6 Will. 4, c. 76), and the defendant, that the defendant should alter the situation of the Charlton Arms, and should be paid by them the sum of £500 for making such alterations, which should be set against the rent payable by the defendant to the corporation; and the plea then went on to aver, that the defendant had made the alterations accordingly. Replications, taking issue on each of the pleas.

A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal.

At the trial before Gurney, B., at the last Shrewsbury

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Summer Assizes, 1839, the defendant offered in evidence the following resolution, entered in the corporation books at a meeting of the old corporation :—

“28th of October, 1835.

“Resolved—That £500 be paid to Mr. Charlton, to alter the Charlton Arms according to the plan produced by Mr. Atkins, if he will give his consent to the alteration.

“Mr. Charlton then addressed the meeting, and stated that he had no objection to the Charlton Arms Inn being altered according to the plan produced, and on receiving £50 to alter the present road to the stables, if Mr. Stead thought that such sum would be necessary to make a convenient approach to the stables.

“The thanks of the meeting were then given to Mr. Charlton, for the readiness he has shewn to accommodate the public.”

The plaintiff's counsel objected to the reading of this entry, on the ground that it ought to have been stamped as an agreement. The learned Judge received the evidence, subject to the objection. It was proved also that the defendant had made the alterations agreed on, at the Charlton Arms and in the road, which were finished early in the year 1836, and that the expense of them exceeded £500. The learned Judge, in summing up, expressed his opinion that the third plea was not proved, and left it to the jury, upon the second issue, to say whether there was an agreement between the old corporation and the defendant, whereby they agreed to pay the defendant the sum of £500 to alter the Charlton Arms, and whether the defendant had performed the agreement on his part. The jury found these questions in the affirmative; and the learned Judge then directed a verdict to be entered for the plaintiffs for £300, (the balance of rent in

arrear, after deducting payments proved by the defendant), giving the defendant leave to move to enter a verdict for him on the second issue, if the Court should be of opinion that the entry in the corporation book did not require a stamp.

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In Michaelmas Term, *Talfourd*, Serjt., obtained a rule nisi accordingly; against which, in Easter Term last,

Ludlow, Serjt., (*Whateley* with him), shewed cause.—

[The argument on the question as to the stamp is omitted, as the judgment of the Court turned on another point.]

Assuming that there was evidence of a contract between the old corporation and the defendant, it was invalid, not being under the corporation seal. It is clear law, according to all the authorities, that a corporation cannot bind itself by a contract which is to have the effect of vesting or divesting corporation property, except under its common seal. 1 Bla. Comm. 475; Com. Dig., "Franchise," (F) 12, 13, 14; Bac. Abr. "Corporation," (E) 3; *Wilmott v. Coventry* (a). It is laid down, indeed, in the books, that certain small insignificant acts, not affecting the revenues of the corporation, may be done by the head alone, without using the common seal; such as appointing a butler, cook, or bailiff: *Carey v. Matthews* (b), *Smith v. Birmingham Gas Light Co.* (c). The only other exception to the general rule is in cases where the legislature has invested particular officers of trading corporations with the power of drawing bills in the name of the entire body: *Slark v. Highgate Archway Co.* (d), *Broughton v. Manchester Waterworks Co.* (e). In this case, the contract divests a considerable interest out of the corporation. [*Parke*, B.—I doubt

(a) 1 Y. & C. 518.

M. 771.

(b) 1 Salk. 191.

(d) 5 Taunt. 792.

(c) 1 Ad. & E. 526; 3 Nev. &

(e) 3 B. & Adol. 1.

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whether any case has gone so far as to shew that a corporation can bind itself by such a contract as this, not under seal. The old cases permitted it as to certain small things, which must of necessity be done without that formality, and this exception has been extended by the modern cases to things which the corporation, by the nature of its constitution, must do to carry on its concerns: but that principle does not apply to the case of a municipal corporation; it cannot be necessary for the purposes of its constitution, that it should part with so much of its property. The cases decided in the Court of King's Bench (*a*) have broken in upon the old law, but not to this extent. The American law has entirely abrogated the old doctrine (*b*), but we have not.]—The Court then called on

Talfourd, Serjt., and *R. V. Richards*, to support the rule.—The distinction on this subject is between contracts *executed* and *executory*. A corporation cannot be sued on an executory contract, unless it were entered into by an instrument executed under the common seal; but where the contract has been actually executed, and the corporation has enjoyed the benefit of the consideration for it, an implied assumpsit arises against them. *East London Water Works Co. v. Bailey* (*c*); *Mayor of Stafford v. Till* (*d*); *Mayor of Carmarthen v. Lewis* (*e*). Suppose, instead of agreeing with Mr. Charlton, the corporation had contracted by parol with a road contractor who did the work,—could he not have sued them in assumpsit? In the case last cited, the subject of the action was *tolls*—things incorporeal, which could not properly be let at all without deed; yet the benefit of the parol demise having been enjoyed by the

(*a*) *Beverley v. Lincoln Gas Co.*, the Law of Agency, pp. 45, 46.
6 Ad. & E. 829; *Church v. Imperial Gas Co.*, Id. 846. (c) 4 Bing. 283; 12 Moore, 533.
(*d*) 4 Bing. 75.
(*b*) See Story's Commentaries on (e) 6 C. & P. 608.

defendant, they were held to be recoverable in *assumpsit*. The law on this subject has been much relaxed since Blackstone's work was written, and exceptions have been introduced quite beside the old notion of small insignificant matters, which must be done in haste. Where is the line to be drawn between important and unimportant acts? is it to vary with the wealth and greatness of the corporation? There are, indeed, cases where trading corporations have even been held suable on *executory* contracts: *Church v. Imperial Gas Light Company* (a). [*Al-der-son*, B.—Those are cases in which the corporation is called into existence solely for the purpose of trading. The case of *Taylor v. The Dulwich Hospital* (b) is an authority against the general proposition you contend for. Is not this a contract binding the corporation to pay money out of their revenues?] So would every contract of every kind. The argument for the plaintiffs would go to this, that in no case could repairs, however trifling, be done for a corporation, unless the order or contract were under seal. The solution of the difficulty appears to be contained in the observation of *Coleridge, J.*, in *Church v. Imperial Gas Light Company* (c): "The truth seems to be, that the rule on this subject has been relaxed, in consequence of the necessity produced by changes in the circumstances of the times. It is difficult to reconcile all the decisions with strict legal principles." Actions may be maintained against a board of guardians. [*Rolfe*, B.—They are only corporations for particular purposes. The cases in which it has been said that a cook or butler need not be appointed under the common seal, rest on a fiction that some individual has been duly authorized to make contracts of that nature on behalf of the corporation].

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Cur. adv. vult.

(a) 6 Ad. & E. 846; 3 N. & P.
35.

(b) 1 P. Wms. 655.

(c) 6 Ad. & E. 853.

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In this term, the judgment of the Court was delivered
by

ROLFE, B.—The principal point on which we reserved our judgment in this case, was as to the right of the defendant to set off a sum of money, alleged to be due to him from the plaintiffs, against their demand for rent sought to be recovered in this action. It appeared at the trial, that, after the rent in question had become due from the defendant to the corporation, a resolution was entered into at a corporate meeting, holden soon after the passing of the Municipal Reform Act, whereby it was resolved, that a sum of £500 should be paid to the defendant, in consideration of certain improvements to be made by him in altering the Charlton Arms Inn. To this resolution the defendant, who was present, assented, and a memorandum of such assent was duly entered in the books of the corporation. The defendant has since made the proposed alterations, and he now seeks to set off the £500 against the sum due for rent.

Whether the resolution of the corporation required a stamp as an agreement, or as evidence of it, was one point reserved by my Brother *Gurney*, and discussed at the bar. It becomes unnecessary to decide that point; because we are of opinion that, if the agreement be taken to have been duly proved, the defendant has no right to make such a set-off; and we come to this conclusion upon grounds wholly independent of any considerations arising from the Municipal Reform Act. The alleged contract between the corporation and the defendant is not founded on deed, but rests wholly on what is to be found in the corporate books; and we are of opinion that such a contract does not bind the corporation.

The rule of law on this subject, as laid down in all the old authorities, is, that a corporation can only bind itself by deed. See *Comyns' Digest*, tit. "Franchise," (F) 12, 13,

and the authorities there referred to. The exceptions pointed out rather confirm than impeach the rule. A corporation, it is said, which has a head, may give a personal command, and do small acts; as it may retain a servant. It may authorize another to drive away cattle damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems, from the earliest time, to have been considered as delegated by the rest of the members to act for them.

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In modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by Royal Charter, more frequently by act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held that they would imply in those who are, according to the provisions of the Charter or act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench, in *Beverley v. Lincoln Gas Light and Coke Company*(a).

The present case, however, was argued at the bar, as if, by the decision in that last case, the old rule of law was to be considered as exploded, and as if, in all cases of executed contracts, corporations were to be deemed bound in the same manner as individuals. But this would be pressing the decision in question far beyond its legitimate consequences; and that the Court of Queen's Bench had no such

(a) 6 Ad. & El. 829.

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meaning, is plain from the subsequent case of *Church v. Imperial Gas Light Company (a)*. Lord *Denman*, in delivering the judgment of the Court in that case, says, (p. 861,) "The general rule of law is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions: on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."

To every word of this we entirely subscribe, and, applying the language of Lord *Denman* to the present case, it is quite clear that there was nothing to enable the corporation of Ludlow to contract with the defendant otherwise than in the ordinary mode, under the corporate seal.

In contracting without a seal, there was no paramount convenience so great as to amount almost to necessity. To have required a seal would certainly not have tended to defeat the object for which the corporation was formed, nor was the subject-matter of the contract one either of frequent ordinary occurrence, or of urgency admitting no delay.

(a) 6 Ad. & El. 846.

Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation, knows that he is liable to be bound in his corporate character, by such an act; and persons dealing with the corporation know, that by such an act, the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

We have made these remarks, in consequence of the very great length to which some of the arguments addressed to us, as to allowing corporations to contract otherwise than under seal, would go. The case, however, under discussion

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does not call on us to do more than say, that none of the authorities warrant us in giving effect to the resolution relied on by the defendant, and consequently the rule nisi for setting aside the verdict must be discharged.

Rule discharged.

WAUGH v. COPE.

The plaintiff, an attorney, had done professional business of various kinds for the defendant, in 1827 and several subsequent years. In July 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2*l.* 2*s.* and 10*s.* 6*d.*, inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2*l.* 2*s.* and 10*s.* 6*d.* were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs, amounting to £289, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for £3 and £5 cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in Jan. 1839:—*Held*, that the letters given in evidence did not sufficiently shew that the 2*l.* 2*s.* and 10*s.* 6*d.* were paid in part discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations, as to any part of the demand.

THIS was an action for the work and labour, &c., of the plaintiff as an attorney, and on an account stated. The defendant pleaded, 1st, non assumpsit; 2ndly, the Statute of Limitations, and 3rdly, a set-off: on which issues were taken and joined. At the trial before Lord Abinger, C.B., at the Middlesex sittings after Easter Term, 1839, it was agreed that the amount of the plaintiff's bill of costs, and the liability of the defendant, should, in the event of a verdict being found for the plaintiff, be referred to the Master; and the only question which was entered into at Nisi Prius was, whether the Statute of Limitations applied to the whole or any portion of the plaintiff's claim. The bill of costs delivered by the plaintiff amounted in the whole to the sum of £289, and all the items were dated above six years before the commencement of the action; beginning in the month of June, 1827, and the two last items being as follows:—

"25th Sept. 1830..... Cash advanced, £3.

"10th March, 1831. Attending you on application for loan of £5 Cash advanced, £5."

All the previous items were charges for various kinds of professional business done by the plaintiff for the defendant. It appeared that in the year 1832, an inquiry took place as to the lunacy of a Miss Bagster, in which the defendant was a witness: and the plaintiff, who was the solicitor concerned on this inquiry, having written to him to ask him what his expenses on that occasion were, the defendant wrote to him, in answer, a letter dated 21st July, 1832, which was read on the part of the plaintiff, requesting the plaintiff "to allow what was usual, and *place the same to his* (the defendant's) *account.*" A letter was then put in, from the plaintiff to the defendant, dated 13th March, 1833, which was as follows:—

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"Dear Sir:—The allowance for your coach-hire, &c., in attending at Westminster on Miss Bagster's case, is two guineas, for which I send a receipt for your signature, and shall be obliged by its immediate return, as I have to produce it before the Master at 10 o'clock on Saturday morning. I also send a receipt for half-a-guinea, the sum allowed for the like purposes, for your attendance at Doctor's Commons. As a gentleman, nothing is allowed for loss of time. *I will give you credit for the sums in my account against you,* agreeably to your note of the 21st of July last.

Yours truly,

GEO. WAUGH."

In the defendant's reply to this letter, which was also produced, he inclosed the receipts signed by him, and merely stated, that he hoped, for the future, something would be allowed for the attendance of a gentleman. The receipts were put in and read, and it was proved that the 2l.2s., and 10s.6d. were paid to the plaintiff. It was further proved, that on the 26th January, 1838, the plaintiff applied to the defendant for £10 or £20 on account of his bill, and it was stated by the plaintiff's counsel, that shortly afterwards a sum of £10 was paid by the defendant to the plaintiff, which the defendant himself, in his

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particulars of set-off delivered to the plaintiff's attorney, claimed as having been paid in February, 1838. It being alleged, however, on the part of the defendant, that this was a miscopying of 1338 instead of 1830, and the original particulars of set-off having been referred to as shewing this to be the case, it was agreed that it should also be referred to the Master to make an interlocutory report to the Lord Chief Baron, whether such payment of £10 was made after and in pursuance of the plaintiff's letter of January, 1838. The plaintiff's bill was delivered in November, 1838, and this action was commenced on the 7th of January, 1839.

A verdict was then taken for the plaintiff for the amount claimed, with leave for the defendant to move (subject to such interlocutory report of the Master) to enter a nonsuit; which failing, the liability of the defendant, and the amount due, were also to be referred to the Master.

On the 7th November, 1839, the Master made his interlocutory report accordingly, finding that there was not any payment of the £10 in the year 1838, after and in pursuance of the plaintiff's letter. And thereupon

Erle, for the defendant, obtained a rule nisi for entering a nonsuit, on the ground that the letters and payments proved in evidence were not sufficient to take the case out of the Statute of Limitations; for that it did not sufficiently appear that there was part-payment of a larger sum admitted to be due; and he cited *Williams v. Griffiths (a)*, and *Waters v. Tompkins (b)*. In Easter Term,

Kelly (Ogle with him) shewed cause.—The only question now is, whether the payment to the plaintiff of the two sums of 2*l.* 2*s.* and 10*s.* 6*d.*, in the month of March, 1833, was sufficient to take this case out of the operation of the Statute of Limitations: and it is submitted that

(a) 2 C., M., & R., 45.

(b) *Id.* 723.

it clearly was. Those sums were paid under the express direction of the defendant, and with his consent placed to his account in the plaintiff's books. There had been, for some years, to the defendant's knowledge, an account against him in the plaintiff's books; and although the precise amount of it was not then known to him, that can make no difference. The first letter of the defendant, although it was before the six years, is important, as shewing his authority, under which, within the six years, the payments were made. If the plaintiff could then have assessed the defendant's charges for his attendance as a witness, that letter was a direct authority to the plaintiff to place the sum so assessed and allowed to the defendant's account. Then, when the charges were assessed and allowed, and the defendant was informed thereof, in March, 1833, he does not revoke his former direction to place the amount to his account, but acquiesces in the plaintiff's having done so. The transaction is the same as if there had been direct payment of the money by the defendant to the plaintiff, in part discharge of his bill. The defendant might have deducted these sums under a plea of payment. It is not pretended that there was more than one account existing between the parties, and this was clear evidence of payment on account of the only demand the plaintiff could have on the defendant.

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Erle and Montague Smith, contra.—[*Parke, B.*—Is it not rather a question of fact than of law, viz., what account the defendant believed to be referred to in the plaintiff's letter of the 13th March, 1833? The transaction is equivalent to payment of 2*l.* 12*s.* 6*d.* on *some* account; on *what* account is a question of fact. In order to take the case out of the statute, the defendant must have believed himself to be paying on account of some larger demand, which he admitted to be due.] There was no evidence to go to the jury of a part-payment to satisfy the statute,

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viz., a payment in part of a greater amount thereby admitted to be due. It appears that there were two demands—one for the business done, and the other for money lent; can it be said there was evidence to take either out of the statute, and which? The cases shew, that in order to have that effect, it must appear, first, that the payment was made on account of *a debt*; next, that it was made on account of *the particular debt* in dispute; and, lastly, that it was made as part-payment of a *greater debt*. *Tippits v. Heane* (a), *Williams v. Griffiths*, *Waters v. Tompkins*, *Routledge v. Ramsay* (b). The defendant's words are only "place the sums to my account." It does not at all follow from these words on which side the balance was, still less that it was the balance sought to be recovered in this action. [*Parke*, B., referred to *Mills v. Fowkes* (c). Lord *Abinger*, C. B.—If it were proved by extrinsic evidence that a larger demand was due, would not the letters be evidence that it was not all paid?] Perhaps so; but the burthen of proof is on the plaintiff to prove affirmatively such a payment as is necessary to satisfy the statute. If the words used in the letters are equally consistent with the account being in favour of the defendant, that is not sufficient. The plaintiff is bound to give evidence of words written by, or acts of, the defendant, from which an acknowledgment of *the debt* is legitimately to be inferred. If this be held a sufficient proof of payment to prevent the operation of the statute, the effect is, that if there be one debt twenty years old, and several others of a different nature also beyond the six years, one recent small payment, not applied to any one of them in particular, will have the effect of reviving the whole.

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 1 C., M., & R., 252.

(b) 8 Ad. & Ell. 221; 3 N. & P. 319.

(c) 5 Bing. N. C. 455; 7 Scott, 444.

Lord ABINGER, C. B. [After stating the facts of the case, he continued :]—The question is, whether there was in this case a sufficient payment on account to take the case out of the operation of the Statute of Limitations. Since Lord *Tenterden's* act, after the six years have elapsed, nothing will revive the debt, except an acknowledgment in writing, from which a promise to pay can be inferred, or a part-payment of principal or interest. Now there have been several cases in which it has been considered, after much discussion, and adopted by all the Courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in *part*-payment of the debt in question : if it stands ambiguous whether it be part payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party ;—if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the Statute of Limitations. And we think it does not satisfactorily appear, from the letters given in evidence in this case, that the defendant admitted that there was any existing account against him, more than the sum he was paying : all that he admits is, that the money, when received, is to be applied in discharge of the account which the plaintiff had against him ; but there is no distinct admission that that was an existing debt of which that was a payment in part. We think, therefore, that the case falls within the principles of the decisions in this Court, and also in the Court of Common Pleas, and that the rule must be made absolute to enter a verdict for the defendant on the plea of the Statute of Limitations.

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Rule absolute accordingly.

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METCALFE v. FOWLER.

In an action by the intended purchaser against the vendor of an estate, the declaration stated articles of agreement between the defendant and the plaintiff, whereby the defendant, in consideration of £2115, agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff &c., with a good title; and the plaintiff agreed, that, on the said 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and that in case the purchase should not be completed on the said 25th day of March, the plaintiff was to pay interest on the purchase-money before it was completed.

Breach, that, although the plaintiff was always, from the making of the agreement *until and upon the said 25th day of March*, ready and willing to accept a conveyance, and to pay the purchase-money, whereof the defendant had notice &c., yet the defendant did not, on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title, &c.; alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's:—*Held*, that upon this declaration the plaintiff could not recover for any expenses or loss of interest subsequent to the 25th of March.

ASSUMPSIT. The declaration stated, that, by articles of agreement made the 16th February, 1838, between the defendant and the plaintiff, the defendant, in consideration of £2115 to be paid to him by the plaintiff at the time and in manner thereafter mentioned, did thereby (amongst other things) agree with the plaintiff that he the defendant, or his heirs, should or would, *on or before the 25th day of March* then next ensuing, together with all proper and necessary parties, well and effectually convey, surrender, and assure unto and to the use of the plaintiff and his heirs, or unto such other person or persons as he or they should appoint, with a good title, and free from all incumbrances whatsoever, (except as therein and hereinafter mentioned) a certain estate, lands, and premises of the said defendant, lying in Kirton, in the county of Lincoln, in the said agreement particularly specified, together with the appurtenances thereto belonging, subject to the footway or footways over the same, as in the said agreement in that behalf mentioned; and the plaintiff did thereby, for himself, his heirs, executors, and administrators, agree with the defendant, his heirs and assigns, amongst other things, in manner following, that is to say, that the plaintiff, his heirs, executors, or administrators, should or would, *on the 25th day of March then next, on having such conveyance, surrender, and assurances duly made and executed to him as aforesaid*, well and truly pay or cause to be paid unto the

defendant, his heirs, executors, or administrators, the said sum of £2115, in full for the absolute purchase of the said estate and premises; and it was mutually agreed between the said parties thereto, that the expenses of making out the title to the said estate and premises, and of a covenant for the production of the original title-deeds, if required, should be paid by the defendant and his heirs; and that the expenses of the conveyance and surrender of the estate and premises to be made in pursuance thereof, should be paid by the plaintiff and his heirs: and it was further mutually agreed between the said parties thereto, *that in case the purchase of the said estate should not be completed on the said 25th day of March* then next, then and in such case *the plaintiff was to pay interest* on the said purchase-money, at and after the rate of £4 per cent. per annum, from that time until the said purchase should be completed. The declaration then (after setting forth other stipulations, which it is not necessary to state, and averring mutual promises) alleged as a breach, that, although the plaintiff was always, from the time of the making of the agreement *until and upon the said 25th day of March*, ready and willing to accept from the defendant, and at the expense of the plaintiff, a good and proper conveyance, &c., of the said premises, in the manner stated in the said agreement, and to pay him the said purchase-money or sum of £2115, as in the agreement also mentioned, and in all things to perform the said agreement on his the plaintiff's part, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and the plaintiff *then* requested the defendant to deduce and make, or cause to be made, to the plaintiff a good and sufficient title to the said tenements (except as in the said agreement mentioned), enabling the defendant to convey and assure the same to the plaintiff; yet the defendant did not nor would, on the day and year last aforesaid, *or at any other time whatsoever*, deduce or make or cause to be made to the plaintiff a good

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and sufficient title to the said tenements, &c.; and the defendant further deceived the plaintiff in this, to wit, that he had not, on the day and year last aforesaid, or at any other time since the making of his said promise, any such title as aforesaid; by reason of which said several premises the plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the said completion of the said purchase, &c., but was put to great charges and expenses, amounting in the whole to, &c., in and about the negotiating and agreeing for the purchase of the said tenements, as aforesaid, and in and about the investigating the title to the same, &c., &c.; and also thereby the plaintiff lost and was deprived of the interest and profit which he might and otherwise would have made and acquired from using and employing the said sum of £2115, provided and kept by him for the completion of the said purchase, amounting to &c., and the plaintiff hath been and is otherwise injured.—There was also a count on an account stated.

Pleas—1st, non-assumpsit; 2ndly, as to the first count of the declaration, payment into Court of £20, and no damages ultra.—Replication thereto, damages ultra.

At the trial before Lord Abinger, C. B., at the sittings at Guildhall after last Hilary Term, the plaintiff claimed to recover a sum of 71*l.* 4*s.* 9*d.*; viz., for the expenses of investigating the title, 38*l.* 0*s.* 4*d.*, and for loss of interest on money paid in to a banker's for the purpose of completing the purchase of the property in question, (which consisted of freehold and copyhold lands, of borough English tenure, at Kirtton in Lindsey, in Lincolnshire), 33*l.* 4*s.* 5*d.* It appeared, however, that the expenses of investigating the title, incurred up to the 25th March, 1838, the day on which the purchase was, according to the contract, to have been completed, did not amount to £20, the sum paid into Court; but much negotiation took place between the parties after that period,

and it was not until the 12th January, 1839, that the plaintiff served the defendant with a notice of his abandonment of the contract, on the ground of defects in the title. It was objected for the defendant, that upon the declaration as framed, the plaintiff was not entitled to recover any damages accruing after the 25th March, the material day specified in the written contract for the completion of the title, the ground of action being its non-completion *on that day*, and the subsequent expenses and loss of interest not being a consequence of that default. The Lord Chief Baron reserved the point, and a verdict was found for the plaintiff, damages £41; leave being reserved to the defendant to move to enter a nonsuit.

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In Easter Term, *R. V. Richards* obtained a rule nisi accordingly, citing *Flureau v. Thornhill* (a), and *Sherry v. Oke* (b): against which

Bayley (with whom was *Kelly*) now shewed cause.—The plaintiff is entitled to recover, on this declaration, the expenses of investigating the title, and also the loss of interest which accrued between the 25th March and the day when the contract was ultimately broken off. The declaration contains a sufficient averment of the non-performance of the contract by the defendant, *subsequently* to the 25th March. It is averred, that the plaintiff was ready and willing to perform his contract on the 25th March; but that the defendant did not, on that day or at any other time whatsoever, deduce a good title to the premises; and that he had not, on that day or at any other time since the making of his promise, any such title. [*Alderson*, B.—The words “at any other time whatsoever,” must be taken to mean at any other time *before* the day appointed for the completion of the purchase.]

(a) 2 W. BL. 1078.

(b) 3 Dowl. P. C. 349.

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Time was not of the essence of the contract; and it was a question for the jury to determine, on all the circumstances of the case, whether the parties did not treat it as one which was to be completed subsequently to the day originally limited, and whether all the subsequent negotiations did not take place with the assent of the defendant.—He cited *Morton v. Lamb* (a).

R. V. Richards and *Gurdon*, in support of the rule, were not called upon: and

PER CURIAM.—The objection made on the part of the defendant is, that the plaintiff, not having averred in his declaration that he was ready and willing to complete the purchase *after* the 25th March, cannot recover in respect of the expenses of investigating the title, or the loss of interest which accrued subsequently to that day; and we think the objection must prevail. Time is clearly of the essence of such a contract; and if the plaintiff sought damages for loss incurred subsequently to the period limited by the contract for the completion of the purchase, he ought to have framed his declaration accordingly. He was under no necessity of keeping his money at the banker's after the 25th March. The rule must be absolute to enter a nonsuit.

Rule absolute.

(a) 1 T. R. 125.

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COVENANT.—The declaration stated, that, by articles of agreement, dated the 11th October, 1839, made between the defendant of the one part, and the plaintiff of the other part, [profert], after reciting that the defendant, on the 19th day of April, 1838, entered into four several contracts or agreements with Mr. T. W. Jones, as agent for and on behalf of the plaintiff and other owners of the hereditaments thereafter described, for the purchase of a messuage or dwelling-house, outbuildings, gardens, orchard, and premises, with nine several fields, closes, pieces or parcels of land or ground thereunto belonging, in the said indenture more particularly described, lying and being in Hough, in the parish of Wybunbury in the county of Chester, and which were then in the several holdings or occupations of the plaintiff, T. Hassall, George Glover, and Anne Steele, their respective assigns or under tenants, for the several prices or sums of £800, £510, £260, and £350, making together the sum of £1920, exclusive of the timber trees, and saplings of the value of 2s. 6d. and upwards, growing on the said lands; and that all the objections to the title of the said purchased messuage, lands, and premises, (except the want of a conveyance from Miss Anne Maria Hopkins, of the legal estate affecting one moiety of the said messuage, land, and premises, which was outstanding in her as the infant heiress at law of the party in whom such legal estate was last vested), having been cleared up and obviated, the defendant was then desirous, and had proposed and agreed to complete his said purchase and contracts, and to accept a conveyance of the said purchased premises from the plaintiff and the other

A declaration in covenant by the vendor against the intended purchaser of lands, for non payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant; it is sufficient to allege that the plaintiff has always been ready and willing to execute a conveyance: inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution.

By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other

parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c.:—*Held*, that this covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested.

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parties beneficially interested therein, without requiring the said A. M. Hopkins to join in such conveyance, or to execute any separate conveyance of the legal estate so outstanding in her as such infant heiress at law as aforesaid, provided he was allowed till the 1st day of January then next for that purpose, which arrangement the plaintiff had acceded to, as she did admit and acknowledge by being made a party to and executing the said articles of agreement: it was by the said articles of agreement witnessed, that, in consideration of the premises aforesaid, as also for putting an end to all further disputes touching the title to the said messuage, lands, and premises, or the fulfilment and performance of the contracts or agreements so entered into by the defendant, for the purchase of the said premises as thereinbefore was mentioned, he the defendant did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, her heirs, executors, and administrators, and also to and with the several other parties beneficially interested in the said messuage, lands, and premises, their respective heirs, &c. in manner following; that is to say, that he the defendant, his executors and administrators, should and would, on or before the said 1st day of January, 1840, fulfil and perform the said several purchase-contracts or agreements so by him entered into as aforesaid, by paying the purchase-moneys thereby agreed by him to be paid for the said messuage, lands, and premises to the plaintiff and the several other parties beneficially interested therein as aforesaid, and by accepting a conveyance of the said purchased premises from such parties, without requiring the said A. M. Hopkins to join therein, or to execute any separate conveyance of the legal estate so outstanding in her as such infant heiress at law as aforesaid, anything contained in the said purchase-contracts or agreements to the contrary thereof in anywise notwithstanding; as by the said agreements will more fully appear. And the plaintiff saith,

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that the purchase-monies by the said several purchase-contracts or agreements agreed by the defendant to be paid for the said messuage, lands, and premises to the plaintiff and the said other parties beneficially interested therein as aforesaid, were and are the said several sums of £800, £510, £260, and £350, making together the said sum of £1920, &c., &c.; and although the plaintiff hath performed and fulfilled all things in the said articles of agreement contained on her part to be performed and fulfilled, and although she and the several other parties beneficially interested in the said messuage, lands, and premises, have always, from the time of the making of the said articles of agreement, *been ready and willing to execute and make the defendant a conveyance* of the said purchased premises, so to be executed and made as aforesaid, and although the said 1st day of January, 1840, the time for the payment of the said purchase-monies, had elapsed before the commencement of this suit, nevertheless the plaintiff in fact saith, that the defendant hath not yet hitherto paid the said purchase-monies so by the defendant agreed to be paid as aforesaid, or any part thereof, to the plaintiff and the other parties beneficially interested in the said messuages, lands, and premises, or any or either of them, and the said purchase-monies remain wholly due and unpaid.

General demurrer, and joinder.—The points stated in the margin of the demurrer were as follow:—The defendant intends to argue that the action should have been brought by the plaintiff and other persons interested, the covenant being joint and not several; and that the declaration is bad in not averring that the plaintiff, and the other persons mentioned, conveyed or executed any conveyance, or tendered any conveyance to the defendant, such conveyance being a condition precedent, or a concurrent act to be done by the plaintiff and the said other persons; and that the said supposed covenant is void in law, the other

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Whitehurst, in support of the demurrer.—First, the declaration is bad, for not stating a conveyance, or an offer to execute one. There is nothing in the declaration to shew that the purchaser was bound to prepare the conveyance; but even assuming that the defendant was the party to do so, the plaintiff should have averred that she was ready and willing, *and offered* to execute it. It never could be the intent of the agreement, that the defendant should pay before having a conveyance. Where mutual covenants go to the whole consideration, they are mutual conditions, and the plaintiff cannot recover in respect of any breach, unless he proves performance on his part. Com. Dig. "Covenant," (A.2), (D.1): *Pordage v. Cole* (a). It is clear there is an implied covenant by the vendor to convey. If it be held to be sufficient to state merely that the vendor is *ready and willing* to convey, the purchaser may be saddled with an action, although he may be ever so desirous to complete the purchase. The declaration must state all that is necessary to the due performance of the covenant; and the plaintiff was bound at least to have shewn that she made an offer or tender of a conveyance. The allegation of readiness and willingness does not imply any step taken on her part. In Com. Dig. "Covenant," (A.2), it is said—"Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready *and offered* to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part." In *Peeters v. Opie* (b), which was an action upon a covenant that the plaintiff should do certain work for the defendant, for which the defendant was to pay him £8, the declaration contained an

(a) 1 Saund. 320 b.

(b) 2 Saund. 346.

averment, that the plaintiff "always from the time of making the agreement hitherto, was ready, *and offered to perform the said agreement in all things on his part to be performed.*" In *Goodison v. Nunn* (a), which was debt on an agreement by the plaintiff to sell the defendant an estate for a certain price before a day named, in consideration whereof the defendant agreed to pay that sum on that day, and in failure thereof to pay £21; it was held that these were dependent covenants, and that the plaintiff could not recover the £21 without proving that he had executed or *tendered* a conveyance. *Glazebrook v. Woodrow* (b), and *Jones v. Barkley* (c), are authorities to the same effect.—The Court then called on

Esch. of Pleas,
1840.
POOLK
•
HILL.

Crompton to support the declaration.—It was not necessary to aver a tender of the conveyance. No doubt, where the party suing is, by the agreement, to do some *concurrent act*, the performance of it must be averred in the declaration; but that rule cannot be applicable to a case like the present where the initiative is to be done by the other party. The purchaser is always the party to prepare the conveyance, unless it be otherwise expressed in the contract, *Baxter v. Lewis* (d); he, therefore, and not the vendor, is the party who is bound to tender the conveyance for execution. Sugd. Vendors and Purchasers, (6th edit.) 222. The averment, therefore, that the plaintiff was *ready and willing to execute* the conveyance, is quite sufficient. In *Price v. Williams* (e), where, in an agreement for a lease, it was stipulated that the lease should be drawn, prepared, and executed by and between the parties, if required by either of them, *at the sole expense of the lessor*, it was held that it was not necessary for the lessee to tender a lease

(a) 4 T. R. 761.

(d) Forrest, 61.

(b) 8 Id. 366.

(e) 1 M. & W. 6.

(c) 2 Dougl. 684.

Each. of Pleas, for execution by the lessor. It is sufficient that the plaintiff is ready and willing to execute the conveyance, when the defendant, whose duty it is to prepare it, puts him in a situation to do so.

1840.
 POOLE
 v.
 HILL.

Whitchurst, in reply.—This is a covenant very peculiar in its terms. The defendant does not know who the conveying parties are to be; the contract appears to have been entered into by Jones, as the agent for all the parties beneficially interested, whoever they might be. But even if it were the defendant's duty to prepare the conveyance, non constat that it was not prepared; the objection is, that the plaintiff should have shewn that she had offered to execute it. Here the concurrent acts are, payment by the purchaser, and the execution of a conveyance by the vendor. Whether the defendant could have brought an action for the non-completion of the contract, without averring a tender of the conveyance, is a different question. The cases of *Goodisson v. Nunn* and *Glazebrook v. Woodrow* clearly decide, that a conveyance must be either made or tendered by the vendor, before he can sue for the purchase-money. He cited also *Phillips v. Fielding* (a), and *Ferry v. Williams* (b). There is another objection—that the other persons beneficially interested are in law parties to the covenant, and ought to have been joined as plaintiffs. Although they have not sealed the deed, they have made themselves parties to it by adopting the benefit of it. A covenant may be made with persons who are not parties to the deed. This covenant is joint, and therefore all should have joined in the action: *Slingsby's case* (c).

Lord ABINGER, C. B.—The interest of these parties is clearly several, and there is no ground for supporting the

(a) 2 H. Bl. 123.

(b) 8 Taunt. 62.

(c) 5 Rep. 19.

demurrer as to their nonjoinder. On the other point we will take time to consider.

Cur. adv. vult.

Exch. of Pleas,
1840.

POOLE
v.
HILL.

A few days afterwards, the judgment of the Court was delivered by

LORD ABINGER, C. B. [Having stated the declaration, his Lordship continued :]—We were at first disposed to think that the averment that the plaintiff was *ready and willing* to convey was insufficient; but after hearing the point discussed by Mr. *Crompton*, we are satisfied that it was not necessary to aver more than this. On a contract for the sale of lands, unless it be expressly stipulated otherwise, the conveyance is to be at the expense of and to be prepared by the purchaser. Here it was for the purchaser to make out the conveyance in the usual course; that being done, his agreement is on a given day to pay the purchase-money, and the plaintiff's to execute the conveyance and complete the title. The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tendered a conveyance. He was to perform the initiative, before the plaintiff could be called upon to offer a conveyance, and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tendered it for execution. The declaration is therefore good, and the judgment will be for the plaintiff.

Judgment for the plaintiff.

END OF TRINITY TERM.

[The cases determined at the Sittings after Trinity Term will be found in the next volume.]

AN
INDEX
TO THE
PRINCIPAL MATTERS.

AMENDMENT.

See PROCESS, 1.

At Nisi Prius.

An amendment of the *Nisi Prius* record, under the 3 & 4 Will. 4, c. 42, s. 23, must be made during the trial and before verdict, and the judge cannot give the party power to amend on a future day.

Where the original declaration stated that the plaintiff *became and was tenant* to the defendant, of a messuage, on terms contained in articles of agreement between them, whereby the defendant agreed to grant the plaintiff a future lease for 21 years, containing certain covenants: and averred that the plaintiff covenanted to accept such lease, and that, in consideration of the premises, &c., the defendant promised the plaintiff that he should hold and enjoy the premises for the term, without any let, hindrance, &c., from the defendant, or any person claiming through him; that the plaintiff remained and continued such tenant as aforesaid until &c., and paid a quarter's rent; but that the plaintiff broke his promise in this, that one R. had a lawful title to the premises under a pre-

vious lease, granted by the defendant and others, and ejected the plaintiff, &c.: to which declaration there were pleas of non assumpsit, and that the defendant did not become tenant modo et formâ:—*Held*, that the amendment of the declaration, by such alterations and insertions as were necessary in order to treat the agreement, not as an actual demise, but merely as an agreement for a future lease, and making the breach to consist, not in the plaintiff's not holding or enjoying without eviction, but in the defendant's having no title to grant a lease, was not within the stat. 3 & 4 Will. 4, c. 42, s. 23, inasmuch as it introduced an entirely new contract and new breach. *Brashier v. Jackson*, 549

ARBITRATION.

See AWARD.

ARREST.

Under 1 & 2 Vict. c. 110, s. 3.

A judge at chambers, by consent of the parties in a cause, ordered, that on payment of the debt and costs, the costs down, and the debt in six months,

all *further proceedings in the cause* should be stayed. The defendant paid the costs down in pursuance of the order:—*Held*, that the plaintiff could not, within the six months, obtain an order to arrest the defendant, under the 1 & 2 Vict. c. 110, s. 3. *Ball v. Stanley*, 396

ATTORNEY.

(1). *Admission.*

A person admitted and practising as an attorney in the Court of Common Pleas at Lancaster, previously to the rule of Easter Term, 6 Will. 4, is not entitled to be admitted in the superior Courts at Westminster, without being examined and giving the usual notices, &c. *Ex parte Blackhurst*, 693

(2). *Certificate.*

An attorney may recover his fees for business done between the 15th of November and the first day of Hilary Term, although, when the business was done, he had not entered his certificate pursuant to the stat. 37 Geo. 3, c. 90, s. 27.

To an action for work and labour as an attorney, the defendant pleaded, that although, during the time when the work was done, the plaintiff was an attorney duly admitted and enrolled, he had not, during any part of that time, *obtained or entered the certificate required by law*, authorizing him to practise as an attorney during any part of the said time, pursuant to the statute; and the plaintiff during all that time wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never had obtained or entered the same:—*Held*, that this plea was bad on special demurrer, for duplicity.

Semble, that it was also bad on special demurrer, for describing the certificate, not in the terms of the statute, but by words involving its legal operation and effect, *Eyre v. Shelley*, 269

(3). *Taxation of Bill.*

After action brought upon an attorney's bill containing any taxable item, the Court will refer it to taxation, without requiring from the defendant an undertaking to pay the amount found on taxation to be due, or imposing any other terms upon him. *Williams v. Griffith*, 32

(4). *Privileged Communication to.*

Where an attorney sued for work and labour, in issuing an execution against C., and the defence was that he was employed by B. and not by the defendant:—*Held*, that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he the plaintiff had been employed by B. to issue execution against C.: and that this was not a privileged communication. *Gillard v. Bates*, 547

AWARD.

(1). *Publication of.*

Where an order of reference required that the arbitrator should *make and publish* his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day:—*Held*, that the award was "published" and "ready to be delivered," within the meaning of the order, when it was executed by the arbitrator in the presence of and attested by witnesses: and that it could not be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready. *Brooke v. Mitchell*, 473

(2). *Arbitrator's Authority as to Costs.*

All matters in difference on the record in a cause were referred to arbitration, the costs of the action, and of the reference and the award, to be in the discretion of the arbitrator. The arbitrator awarded that the action

should cease, and no further proceedings be taken therein; that the defendant should pay to the plaintiff £50 towards the costs of the cause and reference; that the plaintiff should pay his own and the defendant's costs of the cause and reference, *the said costs to be taxed as between attorney and client*; and that the plaintiff should pay the arbitrator £25 for his fees &c.:—*Held*, that this award was not uncertain or inconsistent; but that the arbitrator had exceeded his authority in awarding costs as between attorney and client; and that the order as to costs was so connected with the rest of the award, that it could not be rejected as surplusage. *Seccombe v. Babb*, 129

(3). *Distributing Issues.*

A declaration in assumpsit contained a count in the sum of £200, for horse keep, and work and labour; and another count in the like sum upon an account stated. The defendant pleaded, as to all except £150, non assumpsit, and as to that sum payment. The cause was referred to arbitration, and the arbitrator awarded, as to the first issue, that the verdict should be entered for the plaintiff; and as to the second issue, so far as it related to £150, he directed a verdict to be entered for the defendant, and as to the residue of that issue, for the plaintiff; and he assessed the damages at 14*l.* 4*s.* 9*d.*, that being the balance which he adjudged to be due to the plaintiff:—*Held*, that the arbitrator was not bound to find the first issue distributively, so as to find for the plaintiff as far as related to 14*l.* 4*s.* 9*d.*, and for the defendant as to the residue. *Bird v. Penrice*, 754

BANKERS.

Liability of.

A. having received a sum of money bequeathed by will to his wife, gave it

to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest:—*Held*, that the bankers were liable to A. for the amount in an action for money had and received. *Calland v. Loyd*, 26

BANKRUPTCY.

See WITNESS, I. 1.

(1). *Determination of Covenants by.*

The defendant, by indenture, demised to E. & W. a fulling mill, for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor; but if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease, the lessees became bankrupt, and their assignees declined to take the lease: but they required the defendant to appoint a person to value the machinery, and on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the original valuation. The assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay:—*Held*, that the assignees (having demanded the machinery) were entitled to recover it in trover, and that their remedy was not by an action on the covenants, which had been determined by the

bankruptcy, and by their refusal to take to the lease. *Fairburn v. Eastwood*, 679

(2). *Retrospective Operation of, 2 & 3 Vict. c. 29.*

1. An act of bankruptcy having been committed on the 6th of July, 1839, a bonâ fide execution was issued on the 8th, under which the goods of the bankrupt were levied. On the 19th of July the 2 & 3 Vict. c. 29, was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees:—*Held*, that the execution was protected by the statute. *Edmonds v. Lawley*, 285

2. The stat. 2 & 3 Vict. c. 29, has a retrospective operation, so as to protect the sheriff from liability in respect of a bonâ fide execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the fiat issued, before the passing of the act, but the assignees were not appointed until afterwards. *Nelstrop v. Scarisbrick*, 684

BILLS AND NOTES.

See PLEADING, II. 10, V. 2; WITNESS, I. 2.

(1). *Notice of Dishonour.*

The following letter was held to be a good notice of dishonour of a bill of exchange:—"6, Bernard Street, Russell Square.—Mr. G.—The bill of exchange for £250, drawn by S. R. on and accepted by C. S., and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies over-due and unpaid with me as above, of which I hereby give you notice." *Lewis v. Gompertz*, 399

(2). *Pleadings in Actions on.*

In an action by the indorsee against the maker of a promissory note, the

first count alleged that the defendant made the note, payable on a certain day, that he delivered the note to the payee, and promised to pay the same according to the tenor and effect thereof; that default was made in payment of the note when it became due, whereby the defendant became liable to pay the amount. The second count was upon an account stated, and alleged that on &c. (a day long subsequent to the note becoming due) the defendant became and was indebted to the plaintiff in &c., on an account then stated between them; and the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money on request:—*Held*, that this was an action on a promissory note, within the meaning of the new rules, and that the plea of non assumpsit was inadmissible. *Donaldson v. Thompson*, 316

BOND.

How far recoverable on by Trustee.

An officer of the Palace Court entered into a bond, with sureties, to the knight marshal of that Court, conditioned for the due performance of the duties of his office; and (inter alia) that he should take sufficient bail from all defendants arrested, and should obey the lawful orders of the Court. Having taken insufficient bail from a defendant arrested in an action in that Court, an order was made requiring him to pay the amount of debt and costs in the action, which he disobeyed:—*Held*, that the knight-marshal was entitled, as a trustee for the plaintiff in the action, to recover, in an action on the bond, the full amount of the debt and costs. *Lamb v. Vice*, 467

BURIAL FEES.

Refore the passing of the stat. 51 Geo. 3, c. 151, the incumbent or mi-

nister of the parish of St. Marylebone, (which was a lay rectory), by himself or his curates, performed the duty on all burials in the parish, and received the surplice fees thereon, as part of the profits of the living. By that act, the vestry of the parish were empowered to provide an additional cemetery for the parish, and erect a chapel thereon; and by sect. 41, the lay rector was empowered to appoint a *burying minister*, to officiate in burying the dead in the said cemetery; a *reader* to perform divine service, and preach in the chapel, and (if it should seem right to the vestry) another minister to be *preacher* in the chapel; such *reader* and *preacher* to receive for their salaries such sums as the vestry should appoint. By sect. 89, nothing therein contained was to lessen or alter the title of the lay rector, or the person for the time being entitled to the rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto. By a subsequent act, 1 & 2 Geo. 4, c. 21, (for effectuating the building of four district churches within the parish), it was enacted that the parish should remain and be one entire and undivided parish for all ecclesiastical and civil purposes: and the plaintiff was subsequently appointed rector of the parish. By the 6 Geo. 4, c. 124, (whereby the four districts were made district *rectories* for certain purposes), the district rectors were empowered (sect. 6) to solemnize marriages and baptisms, and take away all fees for the same; but (by sect. 9) nothing therein contained was to alter or affect the law respecting burials or burial fees with the parish.

In 1824, W. was presented by the Crown (in whose hands the lay rectory then was) to the chapel built under the provisions of the 51 Geo. 3, c. 151, and thenceforth performed all the burials there, and received the burial fees, which he paid over to the plain-

tiff, the rector, until the year 1839; when the defendant, by direction of the vestry, received and retained them:—*Held*, that the plaintiff was entitled to recover the amount of such fees, in an action for money had and received. *Spry v. Emperor*, 639

CAPIAS.

See PROCESS, (2).

CHARTER-PARTY.

See SHIPPING, 1.

COGNOVIT.

Given by Defendant in Execution.

A cognovit given by a defendant who is in custody in execution on a judgment, for the debt and costs in that action, in consideration of his discharge, is valid, if a writ have been sued out to support it: and it lies upon the party impeaching its validity to shew that no writ has been sued out. *Shanley v. Colwell*, 543

COMMISSIONERS OF SEWERS.

A parish, consisting of two districts, had immemorially been assessed to the repairs of a sea bank (which was necessary for the protection of lands from the sea in both districts), by one assessment, collected by one dyke-reeve. The commissioners of sewers, *without any presentment* of a jury, appointed two dyke-reeves, one for each district, and made a rate on one district exclusively for the repairs of the sea bank:—*Held*, that the rate was void for want of a presentment, and that the commissioners were without jurisdiction, and were liable in trespass for the taking of the plaintiff's cattle under a distress warrant issued by them for arrears of such rate. *Wingate v. Waite*, 739

COMMITMENT.

See MASTER AND SERVANT, 2.

CORPORATION.

A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal. *Mayor &c. of Ludlow v. Charlton*, 815

COSTS.

(1). *Security for.*

An application to compel the plaintiff to give security for costs, on the ground of his residing out of the jurisdiction of the Court, may be made after an order has been obtained for time to plead on the usual terms.

But the Court will not grant such an application, where the plaintiff, though a foreigner and usually resident abroad, is at the time actually in this country.

Semble, that the affidavit to ground such an application is sufficient, if it states that the deponent *believes* the plaintiff resides abroad. *Dowling v. Harman*, 131

(2). *Of making Judge's Order Rule of Court.*

Upon a Judge's order, discharging a summons with costs, the costs were taxed and demanded, and not being paid or tendered, the order was made a rule of Court. The costs of making it a rule of Court were also taxed, and both sums were separately demanded. The party tendered the former amount, but refused payment of the latter:—*Held*, that he was not liable to an attachment, the costs of making the order a rule of Court not being costs within the meaning of the order and rule. [See the resolution of the Judges, p. 602]. *Regina v. Gamson*, 603

(3). *Certificate under 43 Eliz. c. 6.*

Where, in an action for assault and battery, the plaintiff recovered less than 40s. damages, and the Judge, at the trial, intimated his intention of certifying to deprive the plaintiff of costs, under the 43 Eliz. c. 6, but after four days the plaintiff obtained the record from the associate, no certificate being indorsed on it, and signed judgment, and the Master, on production of the record, taxed the plaintiff his costs: the Court confirmed an order of the Judge, for producing the record before him, in order to indorse the certificate upon it, and for setting aside the judgment and taxation. *Davis v. Cole*, 624

(4). *Notice of Taxation.*

A notice to attend taxation at Westminster, during term, is sufficient. *Blake v. Warren*, 151

(5). *In the Cause, what are.*

In a cause in which the venue was laid in Middlesex, the Court, on the 30th of January, made absolute a rule for changing the venue, obtained by the defendant, "on payment of the costs of the application, and of all costs reasonably and boná fide incurred and rendered useless by that rule." The plaintiff's witnesses were at that time on their way from Wales to London, the sittings commencing on the 1st of February. The defendant drew up the rule and served it on the plaintiff, and served notice of taxation for the 1st of February. The plaintiff thereupon withdrew the record, and sent back her witnesses into the country. On the 8th of February the costs were taxed under the rule at 209l. 11s.; on the 11th defendant gave notice that he abandoned the rule, and the Court held that he had a right to do so, the rule being only conditional. The cause was tried at the Middlesex sittings after Trinity Term, and a verdict found for the plaintiff:—*Held*, that

2091. 11s. were not, under the circumstances, costs in the cause. *Pugh v. Kerr*, 17

COURT OF REQUESTS.

See MUNICIPAL CORPORATION ACT.

COVENANT.

See BANKRUPTCY, 1; LEASE, 2.

When Covenantor entitled to Notice.

The declaration stated, that, by indenture, the defendant covenanted that he would, at any time or times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him; and that the plaintiff insured the defendant's life with that Company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void:—Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America:—*Held*, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected. *Vyse v. Wakefield*, 442

COVENANT FOR QUIET ENJOYMENT.

See LANDLORD AND TENANT, 1.

DECREE IN EQUITY.

See FERRY.

DEED.

See RAILWAY SHARES.

DEMURRAGE.

See SHIPPING, 1.

DISTRESS.

For Tolls—Pound Breach.

Case.—The first count of the declaration alleged, that the plaintiffs were proprietors of the Parrett Navigation under certain acts of Parliament, which empowered them to receive certain tolls, and in case of refusal or neglect of payment, to seize and distrain the goods in respect of which such tolls ought to have been paid, and the barge laden therewith, or any other goods belonging to the owners of such first-mentioned goods, or to the person from whom such tolls should be due, being on the said navigation or any part thereof, or any premises thereto belonging, and to detain the same until payment of the tolls. It then alleged that a certain sum was due and in arrears to the plaintiffs as and for tolls payable to them under the said acts, for the transit and conveyance of certain goods in a certain barge, then navigated and conducted by the defendants, I. T. and J. M., upon the said navigation; and averred a demand of the tolls from the person so navigating the said barge, who refused to pay the same, a seizure of the barge as a distress, and a rescue by the defendants whilst the plaintiffs' bailiff was about to detain and impound the same:—*Held*, on special demurrer, that the count was bad, inasmuch as it did not shew that the articles distrained were those in respect of which the tolls were due, or the property of the person from whom they were due, and consequently did not shew any authority to distrain them.

The second count stated, that the plaintiffs had seized a certain barge then navigated and conducted by the said I. T. and J. M., and a certain quantity of coals then being in the said

barge, the said barge and coals then being on the said navigation, as a distress for certain tolls then in arrear for the conveyance of certain goods upon the said navigation, and had detained and *impounded* the said barge and coals, with intent to appraise and sell the same, according to the form and effect of the said statutes, whereupon the defendants on &c. *broke the said pound*, and rescued the barge and coals, whereby &c. :—*Held*, that this count was good, because the goods being alleged to have been *impounded*, they were then in the custody of the law, and the defendants had no right to retake them, and in so doing were wrong-doers. *The Proprietors of the Perrett Navigation Company v. Jacob Stower*, 564

DISTRINGAS.

See PROCESS, (3).

DOMICILE.

See LEGACY DUTY, 2.

EVIDENCE.

See FERRY.

RIGHT OF PASTURAGE.
STOCKBROKER.

(1). *Entry against Interest.*

By a promissory note, E. H., W. D., and J. H., jointly and severally promised to pay to J. E. £300, with interest. W. D. having afterwards paid J. E. £280, on account of the note, J. E. made the following indorsement upon it:—"Received of W. D. the sum of £280, on account of the within note, the £300 having been originally advanced to E. H." In an action brought by W. D., who had paid the whole amount due, against J. H., to recover contribution from him "as a co-surety":—*Held*, that the indorsement was admissible in evidence, to prove not only the payment of the

£280, but also that the money was originally advanced to E. H. as principal. *Davies v. Humphreys*, 153

(2). *Admission.*

1. In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods.

And (per *Parke, B.*) the defendant's own admission is always evidence against him, though it refers to the matter of a written agreement. *Newhall v. Holt*, 663

2. A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument: and even though its contents be directly in issue in the cause. *Slatterie v. Pooley*, 664

EXTENT,

What is saleable under.

Under the stat. 25 Geo. 3, c. 35, s. 1, the interest of a crown debtor in leaseholds renewable on lives, may be sold.

The Court refused, at the instance of the Crown, to direct a sale by private contract, but referred it to the Remembrancer to certify which was the most advantageous mode of selling the property. *Regina v. Lane*, 489

FACTORS' ACT.

The plaintiffs, owners of a cargo of tobacco, on the arrival of the vessel, placed the bill of lading (indorsed in blank) in the hands of W., as their factor, for sale. W. entered the goods at the Custom-house in his own name, and (before the cargo was weighed, and without the plaintiffs' knowledge) obtained a dock-warrant for it in his own name. W. had previously agreed with the defendants for the advance to him

(W.) of £20,000, on the deposit of other dock-warrants as a security. The defendants, thinking that security insufficient, refused to advance more than £12,000; whereupon W. pledged with him the dock-warrant of the plaintiffs' tobacco, as a security for, and obtained thereon, the remaining £8000:—*Held*, that, under these circumstances, it did not sufficiently appear that W. was *entrusted* with this dock-warrant, within the meaning of the Factor's Act, 6 Geo. 4, c. 94, s. 2, and therefore that the plaintiffs were entitled to recover from the defendants the proceeds of the tobacco, which was sold by the defendants on W.'s becoming bankrupt.

In order to make the factor a party *entrusted* with the dock-warrant, within the meaning of the act, it must appear that the owner of the goods *intended* that the factor should be possessed of it at the time of the pledge, or that he should exercise the power, which the possession of the bill of lading gave him, of obtaining the dock-warrants whenever he in his discretion might think fit.

The defendants had advanced to W. a sum of £14,000, on the deposit of American state bonds. W. & C. afterwards entered into partnership, and agreed with the defendants, in consideration of their discounting W. & C.'s acceptances for £14,400, to deposit with them as a security dock-warrants for goods held by them. W. & C. accordingly deposited with the defendants the dock-warrant of another cargo of tobacco belonging to the plaintiffs, which they had taken out in their own names, under similar circumstances with the former. The defendants gave up to W. the American bonds, and paid over to W. & C. the balance, after deducting the debt due to them from W., and the discount:—*Held*, that if, according to the intention of both parties, the £14,400 was to be

placed entirely at the disposal of W. & C., to apply it to any purpose of their own as they pleased, and they directed its payment in account to the defendants in satisfaction of W.'s debt, this was an advance of money to W. & C. within the meaning of the 6 Geo. 4, c. 94, s. 2; but if their intention was, that the new advance was only for the purpose of satisfying W.'s former debt, and it would not have been made, except upon the understanding that it should be so applied, and the application of it otherwise would have been a breach of the agreement, then it was not an advance within the statute. *Phillips v. Huth*, 572

FERRY.

A declaration in case for the infringement of a ferry, described the ferry as being across the river Mersey, "from the township, parish, chapelry, or place of Birkenhead, in the county of Chester, to the parish, township, or place of Liverpool, in the county of Lancaster:—*Held*, 1st, that the plaintiff might recover under this declaration, although he proved a ferry *both ways*, as well from L. to B., as from B. to L.; 2ndly, that this description did not import a ferry from the *whole* township, &c., of B., to the whole parish, &c., of L., but that the plaintiff might recover on proof of a ferry from any point within B. to L.

Under a lease of a ferry, describing it as a ferry across a river *both ways*, a ferry across the river *one way* only will pass.

Semble, that the establishment of a ferry across the river Mersey, having its terminus in Birkenhead, within 400 yards of the plaintiffs' ferry, and upon which the defendants carried passengers and goods for hire in boats from Birkenhead to Liverpool, in itself imported an infringement of the plaintiffs' ferry,

for which they might maintain an action.

The plaintiffs derived title to their ferry under a grant from Edward III. to the priory of Birkenhead. The defendants, in disproof of this title, sought to shew that there was a pre-existing ferry from Liverpool to Birkenhead, and from Birkenhead to Liverpool, which rendered the grant of Edward III. void as a grant of ferry. In order to shew that both were ferries one way only, the plaintiffs' from B. to L., and the other from L. to B., the plaintiffs gave in evidence certain proceedings in the Court of Chancery of the Duchy of Lancaster, temp. Chas. I., on an information filed at the relation of the then lessee of the latter ferry under the crown, Sir W. Molyneux, against the proprietor of the former, a Mr. Powell. The information claimed a ferry both ways, and sought to restrain the defendant from proceeding in certain suits in the Court of Requests at Westminster in disturbance of the right of the relator, and prayed process against the defendant to appear in the Duchy Court to answer the premises, and abide the order of the Court. Before answer, the Court made an order, purporting to be "in explanation of an injunction against the defendant to permit the relator peaceably to enjoy his ferry, and take the profit thereof in such manner as the same had been enjoyed for twenty years last past," and whereby, (on affidavit on the part of the relator, stating that the occupiers of the two ferries had been accustomed for twenty years past mutually to account with each other at certain times and places agreed on, concerning the profits of the ferries, the occupiers of Powell's ferry paying to the occupiers of Molyneux's ferry half the profits of the freight laden on the Liverpool side and landed on Cheshire side, and the latter making some payments to the former for

part of the profits of the freight laden on Cheshire side and landed on Liverpool side), the Court ordered that Powell should account and pay as had been accustomed, or in default an attachment should be awarded against him. The answer of Powell also claimed a ferry both ways, founding his title on the grant of Edward III. On the 6th of June, 1627, the Court ordered that an attachment should be awarded against the defendant for his contempt in not accounting according to the former order: and on the 11th of June, a further order was made, that the ferrymen on both sides should weekly account each to other according to the previous usage; that both sides should account each to other for the time past, before the next assizes: that the relator might take out an attachment *de bene esse*, that if the defendant and his ferryman did not account accordingly they might be attached for their former contempts; and that in case the ferrymen of the relator did not account according to that order, an attachment should be awarded against them. It appeared that depositions were afterwards taken in the suit on both sides, but it did not appear what was its ultimate result.

Held, that none of the above orders were admissible in evidence, as not amounting to any final decree, or containing any adjudication of the Court upon the rights of the parties, but merely directing the continuance of a certain state of things *pendente lite*.

A right of ferry is a matter in which the public are interested, and as to which, therefore, reputation is evidence, and so also is a verdict or judgment of a Court of competent jurisdiction, touching the same right, although between other parties. *Pim v. Currell*,

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FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT REPRESENTATION.

See PRINCIPAL AND AGENT, 1.

GUARANTEE.

When continuing.

“In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200:—*Held*, a continuing guarantee, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than £200 had been supplied to and paid for by V. *Mayer v. Isaac*, 605

HUSBAND AND WIFE.

Wife's Survivorship in Choses in Action.

The interest in a promissory note given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime. *Gaters v. Madeley*, 423

INFANT.

Necessaries, Meaning of.

To a declaration for goods sold, &c., the defendant pleaded his infancy, to which the plaintiff replied that the goods were *necessaries* suitable to the degree, estate, and condition of the defendant:—*Held*, that the term *necessaries* included such things as were useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence.

It is a question for the jury, whether the articles are such as a reasonable person, of the age and station of the infant, would require for real use. *Peters v. Fleming*, 42

INFERIOR COURT.

The Court of the mayor of the borough of Liverpool is an inferior and not a superior Court; and therefore a plea that there is another action pending for the same cause in that Court, is no answer to an action in the superior Courts. *Laughton v. Taylor*, 695

INQUISITION.

See RAILWAY ACT, 3.

INSURANCE.

Insurable Interest.

Messrs. H. & Co., being the owners of two ships, called the *Antelope* and the *Maria*, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm oil, agreed *verbally* to sell to the plaintiffs 200 tons of oil to arrive by the *Antelope*, and 100 tons to arrive by the *Maria*. The *Antelope* did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The *Maria*, having 50 tons of palm oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the *Maria*, together with their expected profits thereon:—*Held*, that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced. *Stockdale v. Dunlop*, 224

ISSUABLE PLEAS.

See PLEADING, II. (2).

JOINT STOCK BANKING COMPANY.

1. *Action by Public Officer.*

In an action brought in the name of the public officer of a banking co-partnership company, established under 7 Geo. 4, c. 46, it is not necessary to

allege in the declaration that the plaintiff is a member of the company, that he is resident in England, or that he has been duly registered as required by the 4th section of that act: it is sufficient to describe the plaintiff as one of the public officers of the company duly appointed. *Spiller v. Johnson*, 570

2. Execution against Members of.

The proper course of proceeding under the 13th section of the 7 Geo. c. 46, (the Banking Copartnership Act), which allows executions on judgments obtained in actions against the public officer of the company to be issued against any member or members of the company for the time being, is by *scire facias*, and not by suggestion on the roll. *Cress v. Law*, 217

JOINT STOCK COMPANY.

See PARTNERSHIP, 2.

JUDGE'S ORDER.

See COSTS, 2.

1. Order Nisi, Practice on.

An order nisi before a Judge at chambers makes itself absolute, unless cause be shewn: and if no one appears, the proper course is for the opposite party to go in to the Judge and get it discharged, otherwise it becomes absolute. *Humphreys v. Jones*, 418

2. Appeal from.

Where a Judge at Chambers, upon the hearing of a summons on affidavit, dismisses the summons upon the merits, the party may renew his application to the Court, on additional affidavits. *Pike v. Davis*, 546

JUSTICE OF THE PEACE.

See MASTER AND SERVANT, 2.

NOTICE OF ACTION.

LANDLORD AND TENANT.

See SHERIFF, 1.

1. Relation of, what it implies.

Assumpsit.—The declaration stated, that whereas before and at the time of making the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, for the residue of a term of years, and thereupon afterwards, to wit, on &c., agreed to let to the plaintiff, who then agreed to take of the defendant, the said house and premises at a certain rent; and *in consideration of the premises*, the defendant promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, without any eviction from the parties entitled to the reversion; nevertheless, he the plaintiff was evicted by the party entitled to the reversion:—*Held*, on demurrer, that the declaration was bad, inasmuch as, the plaintiff having declared on the simple relation of landlord and tenant, no such duty as that laid as the defendant's promise arose from that relation. *Granger v. Collins*, 458

2. Holding over.

A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession within the 4 Geo. 2, c. 28, s. 1, to render the tenant liable for holding over after the determination of the notice.

Where, on the receipt of a notice to quit to two joint tenants, one of whom only actually occupied the land, the other said "that he had nothing to do with the land:"—*Held*, that this statement was not admissible to shew that a holding over after the expiration of the notice, was not wilful on the part of the latter.

Quære, Whether a joint tenant is

necessarily liable for the wilful holding over of his co-tenant. *Hirst v. Horn* and another, 393

LAND TAX.

Double Assessment to.

The stat. 1 & 2 Vict. c. 58, s. 2, which enables this Court, on application by the owner or occupier of lands, to call upon Commissioners of Land-Tax to appear and maintain or relinquish their assessments, in cases where such person has been rated twice for the same land, applies only to cases in which two separate and distinct bodies of Commissioners, acting for different districts, have both assessed the same land, each claiming it to be within their district or division, and not to a case where the land has been rated twice by the same body of commissioners. In the latter case the remedy is by appeal under 38 Geo. 3, c. 5, s. 23. *In the matter of the Glatton Land-Tax*, 689

LEASE.

See BANKRUPTCY, 1.

PLEADING, III.(2), 2.

(1). *Lease or Agreement.*

1. By a memorandum of agreement, the plaintiff agreed to let to the defendant, and the defendant agreed to take, a house &c., from the 24th June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years: that the lease to be granted by the plaintiff was to contain a covenant on her part for the defendant to purchase the fee simple for £600 at any time within the first seven years of the said term to be granted; and a covenant on the part of the defendant for payment of the rent of £35, payable quarterly, clear of all deductions for taxes whatsoever; and that the insurance on the sum of £500 was to be paid by the plaintiff,

and to be repaid by the defendant as an increased rent: to lay out within twelve months the sum of £100 on the said premises; to keep the premises in substantial repair; and all other usual covenants as in leases of houses in B.; and that the defendant should execute a counterpart of lease when tendered to him by the solicitor of the plaintiff, and that the expense of the lease and counterpart was to be borne and paid by the defendant:—*Held*, that this was an agreement for a lease, and not an actual demise, and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing. *Chapman v. Towner*, 100

2. By articles of agreement, dated 2nd May, 1838, the defendant agreed with the plaintiff that he would grant him a lease of a messuage, &c., for twenty-one years from Midsummer-day then next, at a rent of £45, payable quarterly, on the usual days of payment in every year during the said term, the first payment to commence on the 29th September then next: to be entered upon immediately by the plaintiff, he having on the day of the date paid £25 to the defendant: and in the lease were to be contained covenants to pay the rent, to repair, &c. &c., and all other usual and reasonable covenants, with a power to either party to determine the lease at the end of seven or fourteen years:—*Held*, that this instrument amounted to an agreement for a lease only, and not to an actual demise; and that the plaintiff was not entitled to recover as for the breach of an implied promise for quiet enjoyment. *Brashier v. Jackson*, 549

(2). *Construction of Covenants in.*

Where, at the sale of the stock of the defendant, the tenant of a farm,

W., the tenant of an adjoining farm, bought two cows, and, by the defendant's permission, left them on the defendant's farm for some weeks, bringing provender from his own farm to feed them:—*Held*, that the manure made by these cows was manure made on the farm, and that the removal of it by W. was a breach of the condition of a bond, whereby the defendant had stipulated with his landlord that he would "put and spread all the manure and compost then collected in the middenstead, or on any other part of the farm, on the meadow land, and would not sell, cart, or convey away any dung, compost, or manure from the said farm." *Hindle v. Pollitt*, 529

LEGACY DUTY.

1. A testator devised real estate to W. T. for life, with remainder to his first and other sons in tail, with remainder to T. P. for life, remainder to his first and other sons in tail, remainder to G. P. for life, with remainders over; and gave a power to the several persons who, by virtue of the limitations in the will, should be in actual possession of the estates, by deed or will to appoint to any woman or women they should marry, by way of jointure, rent charges not exceeding £750 per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. W. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with £750 per annum by way of jointure to his wife, under the power, and died without issue male, whereupon G. P. entered into possession:—*Held*, on error brought upon the judgment of the Court of Exchequer, that G. P. was chargeable with legacy duty after the rate of £10 per cent. on the value of the rent-charge of £750 per annum; af-

firming the judgment of the Court below. *Pickard v. The Attorney-General*, 348

2. A British subject, domiciled and having real and personal estate in England, went abroad and purchased, in 1828, the title, castle, and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, and at other times visited Rome, Florence, and other parts of Italy, residing in furnished lodgings. In 1831 he came to England, and resided in different parts of it till September, 1832. In March, 1832, he sent to R. several cases of plate, books, and wearing apparel. In September, 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R.; he then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent towns, till October, 1833, when he went to Rome, and there lived in furnished lodgings until his death in February, 1834:—*Held*, that upon these facts there was no evidence of the testator's having actually acquired a domicile at R., or elsewhere abroad, although they indicated an intention to make R. his domicile: that his English domicile therefore remained, and legacy duty was consequently payable on the bequests contained in his will.

Quære, whether if he had obtained a domicile abroad, legacy duty would not still have been payable. *The Attorney-General v. Dunn*, 511

3. J. R. by his will, after directing

his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter J. A. P., J. R., J. S., and J. G., his executrix and executors, upon trust, to permit his said daughter to receive the rents and dividends thereof during her life, and after her decease, upon trust, for such person or persons (other than and except J. W. and his relations, M. H., and his relations, and the relations of the late husband of the testator's said daughter, and every of them) in such parts, shares, and proportions, and in such manner and form, as the said J. A. P., whether sole or covent, should by will appoint, and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that in case his said daughter should intermarry with the said J. W., or any of his relations, or should reside with or receive visits from him or them, the bequests in her power should utterly cease. After the testator's death, the said J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and thereby, in exercise of the power under her father's will, she gave £10,000 Consols to the descendants of the before-named D. R., and gave all the rest of her late father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R. the testator.

Held, 1st, that, on the death of J. A. P. a duty of one per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects of J. A. P., after allowing any duty already paid in respect thereof.

2ndly, that no probate duty was payable upon the probate of the will of J. A. P., in respect of the estate and effects bequeathed and appointed by her will.

3rdly, that legacy duty was payable in respect of the bequests contained in the will of J. A. P. at the same rate at which it would have been payable if they had been mere legacies given by her, payable out of her own personal estate. *Platt v. Routh*, 756

LIBEL.

Province of Judge and Jury.

In an action for libel, the judge is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition; and, as incidental to that, whether it is calculated to injure the character of the plaintiff.

A publication may be a libel on a private person, which would not be any libel on a person in a public capacity; but any imputation of unjust or corrupt motives is equally libellous in either case. *Parmiter v. Coupland*, 105

LIEN.

Property held by a party in right of a lien cannot be taken in execution. *Legg v. Evans*, 36

LIMITATION ACT.

In 1788, estates were settled, by marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor, (whose heiress at law she was), in fee. In 1818, by deeds to which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue

in tail, remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828 :—*Held*, that inasmuch as the estate of J. F. was carved out of the estate tail of R. G., she had the same period for bringing an ejectment in respect of any of the estates comprised in the above deeds, as he would have had if he had continued alive; viz. twenty years from the year 1822, when his remainder came into possession.

Whether a writing amounts to an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14, is a question for the Judge, and not for the jury, to decide.

A party in possession, adversely, of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows :—“ Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years.” The bargain subsequently went off, and no rent was paid or lease executed :—*Held*, that this letter was not an acknowledgment of title, within the 3 & 4 Will. 4. c. 17, s. 14. *Doe d. Curzon v. Edmonds*, 295

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LIVERPOOL BOROUGH COURT.

See INFERIOR COURT.

LUNATIC.

See PROCESS, (3).

MASTER AND SERVANT.

(1). *Relation of, when constituted.*

Where the owners of a carriage

were in the habit of hiring horses from the same person, to draw it for a day or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party, it was held that the owners of the carriage were not liable to be sued for such injury.

And it was held to make no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery, which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving his horses while so depositing the livery in their house. *Quarman v. Burnett*, 499

(2). *Jurisdiction of Justices under 4 Geo. 4, c. 34, s. 3.*

The plaintiff was committed by the defendant, a magistrate, under the 4 Geo. 4, c. 34, s. 3, by a warrant of commitment which was in the following form :—“ To the constable of M., Surrey, &c. Whereas information and complaint hath been made unto me, one, &c., upon the oaths of J. H. and S. M., both of M., in the said county of S., calico-printers, that W. J., of M. aforesaid, in the county aforesaid, calico-printer, did on Wednesday, the 8th of May inst., contract with the said S. M., to print certain pieces of woollen cotton goods, and that the said W. J. had adopted such contract, and entered into the service of the said S. M. under such contract; and that the said W. J. hath, in his said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour towards the said S. M., and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said

S. M., without his license or consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true." It then commanded the constable to convey the plaintiff to the house of correction, and deliver him to the keeper thereof, who was ordered to detain him in custody:—*Held*, that this was a commitment in execution, and that it was bad, because it did not shew, either that the contract was entered into, or the work refused to be done, or the plaintiff found, within the jurisdiction of the magistrate. *Johnson v. Reid*, 124

MINES.

See WAYLEAVE.

MINING COMPANY.

See PARTNERSHIP, 2.

MONEY HAD AND RECEIVED.

When maintainable.

By a deed of consecration of a chapel, built by subscription, of which the plaintiff was one of the founders, the chapel-wardens for the time being were to receive the pew-rents, the surplus of which, after payment of certain expenses, was to go towards the repayment of the expense of building the chapel. S. and G., the chapel-wardens for 1838, at the close of their year of office, had in their hands a surplus of £22, payable to the plaintiff as one of the founders. The plaintiff and defendant were the succeeding chapel-wardens, G. handed over the money to the defendant, together with his accounts, with a direction not to pay over to the plaintiff until the determination

of an action against the plaintiff by another of the founders, to recover back money advanced towards the plaintiff's share of the expenses of building the chapel: *Held*, that the plaintiff could not sue the defendant for the amount, as money had and received to his use, before the determination of that cause. *Sewell v. Raby*, 22

MUNICIPAL CORPORATION ACTS.

Authority of Town Council as to Fees in Court of Requests.

By a local act of Parliament, 56 Geo. 3, a Court of Requests was created at Bristol, and certain fees, according to a table therein contained, were fixed to be paid to the assessor and officers of the Court, with power for the justices of the peace for the said city, at any general quarter sessions of the peace, to lessen or reduce them. By 6 & 7 W. 4, c. 105, s. 8, it is enacted, "that every thing provided in any local act of Parliament, to be done by the justices, or by some particular class or description of members of such body corporate, being justices at some court of general or quarter sessions assembled, and which does not relate to the business of a court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council." The town council of Bristol, acting under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 124, and 6 & 7 W. 4, c. 105, s. 8, by an order of council, reduced the fees payable to the assessor and clerk of the Court:—*Held*, that the regulation of the fees of the Court of Requests was a matter relating to the business of a court of civil judicature, and that the town council had no authority to interfere with it. *Palmer v. Powell*, 627

NECESSARIES.

See INFANT.

NEW TRIAL.

See STOCKBROKER.

Motion for, when to be made.

A motion for a new trial may be made at any time within four days after the return day of the distringas juratorum, although more than four days have elapsed since the trial. *Ames v. Lettice*, 216

NOTICE OF ACTION.

To Justices, Computation of.

In the computation of the calendar month's notice of action to a justice, required by the 24 Geo. 2. c. 44, s. 1, the day of giving the notice, and the day of suing out the writ, are both to be excluded. *Young v. Higgon, Esq.* 49

PARENT AND CHILD.

Liability of Parent for debts of Child.

The moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child: and he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them. The defendant's son, an infant of 20 years of age, had lodged for some time with the plaintiff, during a part of which he had earned wages, and paid for his board, &c. He afterwards fell ill, and was unable to pay for the necessaries with which the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer, that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be 21, and would then be able to pay what he owed the plaintiff himself:—*Held*, that this letter was no admission of a liability in the father. *Mortimore v. Wright*, 482

PARTNERSHIP.

PARTICULARS.

See PLEADING, II. (4), (8).

In an action for the breach of a warranty of soundness of a horse, the Court will not compel the plaintiff to deliver particulars of the unsoundness. *Pylic v. Stephen*, 813

PARTNERSHIP.

(1). *By what Terms constituted.*

The plaintiff and defendant, together with others, entered into and signed the following special contract:—"Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter, by means of a small steam-boat, we hereby authorize Mr. G. A. B. to charter the Brockelbank, or any other suitable vessel, for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprise, according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid £10 per cent. on the amount of our subscription, and we hereby bind ourselves, and agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively:—"*Held*, that this agreement constituted a partnership between the parties who signed it; and that the plaintiff, who had paid such debts arising from the undertaking as the earnings

of the boat were insufficient to satisfy, could not maintain an action for money paid against the defendant who had not paid up his subscription, but that the proper form of action was a special action of assumpsit for the non-performance of the undertaking to pay the plaintiff the instalments from time to time. *Brown v. Tapscott*, 119

(2). *In Mining Company.*

Where a mining company was formed, the capital to be £30,000, in 3000 shares of £10 each; and 2000 shares only were actually subscribed for, of which the defendant took 100:—*Held*, that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to shew that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors.

The members of a *mining* company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines. *Tredwen v. Bourne*, 461

PAWNBROKERS' ACT.

On the 24th July goods were pledged with the defendant, a pawnbroker, in the name of Mary Warne, and the duplicate was made out accordingly. She was, in fact, the wife of the plaintiff Vaughan, but it did not appear that this fact was then known to the defendant. A few days afterwards, the same person applied to the defendant for a copy of the duplicate, and a form of declaration of the loss of it, pursuant to the stat. 39 & 40 Geo. 3, c. 99, s. 16, and 5 & 6 Will.

4, c. 62, s. 12. On the 6th August, the plaintiff produced the duplicate to the defendant, and demanded the goods, tendering the money advanced on them and interest, but the defendant refused to deliver them, on the ground of the declaration having been obtained. The plaintiff applied to a magistrate to compel him, and the defendant then (on the 9th August) learnt that the party who pledged the goods was the plaintiff's wife:—*Held*, that upon these facts, the Judge at the trial was wrong in directing the jury that the detention of the goods was in point of law a conversion; and that he ought to have left it to them to say whether the defendant had a bona fide doubt as to the title to the goods, and if so, whether a reasonable time for that doubt to be cleared up, by the party's going before a magistrate and verifying the declaration, pursuant to the 39 & 40 Geo. 3, c. 99, s. 16, had elapsed on the 6th of August; and if it had, that the refusal then to deliver them to the plaintiff amounted to a conversion. *Vaughan v. Watt*, 492

PAYMENT INTO COURT.

See PLEADING, II. (6).

PILOT ACT.

Case against the owner of a vessel, for an injury done by her in running foul of the plaintiff's barge. Plea, that at the time of the injury, the vessel was being conducted, and was navigating the river Thames, under the conduct of a licensed pilot in charge of the vessel, *under and in pursuance of the provisions of the 6 Geo. 4, c. 125*, and that the damage happened to the plaintiff by the default, incompetency, and incapacity of such pilot. Replication, that before the said time when &c., the vessel had, on completing a voyage from India, been brought by a licensed pilot into the St. Katherine's

Dock, and that having there discharged her cargo, was, just before and at the said time when &c., being removed, and in the course of removal, for the purpose of going out of that dock to a certain dry dock in the port of London to be repaired, and that the said vessel was not, at the said time when &c., otherwise navigating or passing upon the said river Thames.

Held, First, that the circumstances stated in the replication brought the case within the exception in the 63rd section of the act, and that the owner was not bound to employ a pilot.

Secondly, that the words "wanting a pilot," in the 72nd section, are not to be confined to such vessels as are, by the provisions of the act, bound to take a pilot, but are to be construed as applying to any vessel, the master or owner of which thinks fit to require one.

Thirdly, that inasmuch as under the 72nd section the pilot could not lawfully refuse to go on board and take charge of any vessel wanting a pilot when required by the owner so to do, he must be considered, when so required and employed, as acting under some of the provisions of the act, and not as the private servant of the owner, and therefore that the owner was protected by the 55th section of the act from his *prima facie* liability in respect of the injury occasioned by the act of the pilot, whilst he was so employed by the owner. *Lucey v. Ingram*, 302

PLEADING.

See ATTORNEY, 2.

BILLS AND NOTES, (2).

DISTRESS.

FERRY.

INFANT.

JOINT STOCK BANKING CO., 1.

LANDLORD AND TENANT, 1.

PRESCRIPTION ACT.

VENDOR AND PURCHASER.

PLEADING.

I. Declaration.

(1). Duplicity.

Assumpsit.—The declaration stated that on &c., the defendant made his bill of exchange, and directed the same to A. & Co., payable to B. or his order three months after date, which period had elapsed before the commencement of the suit; that B. then indorsed it to the plaintiff; that it was presented for acceptance and protested for non-acceptance, of which the defendant had notice; that the bill being wholly unaccepted and unpaid, afterwards &c., when it became due on &c., was presented for payment to A. & Co., who refused to pay the same, whereupon it was protested for non-payment, of all which the defendant had notice. And whereas also the said defendant before &c., to wit, on &c., was indebted to the plaintiff &c., on an account stated; and the defendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several sums respectively on request. To this declaration there was a demurrer for duplicity and uncertainty:—*Held*, that whether the first part of the declaration was considered as two counts, or as one only, it was not demurrable on either of those grounds. *Galway v. Rose*, [See also II. (3.), post]. 291

II. Pleas in bar.

(1). Several pleas.

In trespass *qu. cl. fr.*, the defendant pleaded, 1st, not guilty; 2ndly, that the plaintiff was not possessed; 3rdly, that defendant was seised in fee; 4thly, that A. B. was seised in fee, and that the defendant, by his command, committed the trespass complained of, &c. A summons having been taken out to strike out the 3rd and 4th pleas, the Judge refused to make any order, whereupon an application for that purpose was made to this Court:—*Held*, that

the 3rd and 4th pleas might be pleaded together with the 2nd, as they were not necessarily founded on the same ground of answer or defence, within R. G., H. T., 4 Will. 4, s. 6.

Quære, whether such an appeal lies to the Court, where the Judge at chambers has refused to make any order. *Morse v. Apperley*, 145

(2). *Issuable Pleas, what are.*

A plea to an action by the holder of a cheque, that the consideration for the making of it was money won by a third party of the defendant at hazard, in a common gaming-house, is not an issuable plea, within the meaning of an order to plead issuably. *Humphreys v. The Earl of Waldegrave*, 622

(3). *When bad as amounting to General Issue.*

In an action on the case against the sheriff, the declaration stated a judgment recovered against one R. W., the delivery to the sheriff of a writ of *fi. fa.* issued upon this judgment, indorsed to levy &c.; that the sheriff seized the goods of R. W. within his bailiwick, and remained in possession of them for a long time, during which he might and ought to have sold them, yet that he neglected the execution of his office, and forbore to sell, and afterwards falsely returned that the goods remained in his possession for want of buyers.—To this declaration the defendant pleaded—1st, that he did not take in execution any goods of R. W., or remain in possession by virtue of the said writ for the said space of time, or any part thereof; 2ndly, that he could not, nor might, nor ought to have sold the said goods, or any of them, under or by virtue of the said writ, or to have raised thereout the monies indorsed to be levied, within the space of time in the declaration mentioned; 3rdly, that R. W. became a bankrupt, and that within two months after the issuing of the writ in the declaration mentioned,

and the delivery thereof to the defendant, and of the seizure of the goods, and before the passing of the 2 & 3 Vict. c. 29, and before the defendant could or ought to have sold the said goods, a fiat issued, and the said R. W. was declared a bankrupt; and that, before the commencement of the action, an official assignee was appointed, in whom the said goods so taken in execution became and were vested.

Held, that the first plea was bad for duplicity; that the second plea was bad, as amounting to the general issue; and that the third was bad, as being an argumentative denial of the seizure of the goods of R. W. *Rowe v. Ames*, 747

(4). *Payment.*

Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict. *Eastwick v. Harman*, 13

(5). *Release.*

The Court will not set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant. Fraud upon the releasor is not a ground for setting aside the plea, since that may be replied. *Wild v. Williams*, 490

(6). *Payment into Court.*

1. A plea of payment into court, by two defendants, pleaded to one or more indebtedness counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on, to the amount of the sum paid in; and does not admit the defendants' joint liability to any greater amount,

although the plaintiff gives evidence aliunde to fix one of the defendants with liability to a greater amount. *Stapleton v. Nowell*, 9

2. To a declaration in debt, containing a count upon a bill of exchange for 33*l.* 3*s.* 9*d.*, with counts for goods sold, and upon an account stated, each in the sum of £70, and demanding in the usual form the sum of 173*l.* 3*s.* 9*d.*, the defendants pleaded, except as to £20, parcel of the sum of 173*l.* 3*s.* 9*d.* in the declaration demanded, and for the payment of which said sum of £20 the plaintiff has given the defendant credit in his particulars of demand, actionem non, because the defendants now bring into Court the sum of 13*l.* 12*s.*, ready to be paid to the plaintiff, and they further say that they were never indebted to the plaintiff to a greater amount than the said sum of 13*l.* 12*s.* in the introductory part of this plea mentioned:—*Held*, that the plea was bad on special demurrer; that it ought to have shewn some answer as to part, and pleaded payment into Court as to the residue. *Armfield v. Burgin*, 281

(6). Failure of Consideration.

Plea, to an action by drawer against an acceptor of a bill of exchange for 20*l.* 8*s.* 6*d.*, that before the drawing and acceptance of the bill, it was agreed between the plaintiff and defendant that the plaintiff should do certain carpenter's work for the defendant for £63; that the defendant paid the plaintiff £43, in part payment of the £63, and afterwards accepted the bill of exchange, on account of the residue of the £63; that the plaintiff did not perform his agreement, but neglected to perform some work, and performed in an unworkmanlike manner other work, necessary to be done under the agreement; and that the £43 was more than the whole work

done was worth:—*Held* bad, on motion for judgment non obstante verdicto, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment and the bill were alike applicable. *Trickey v. Larne*, 278

(7). In Debt.

Debt for goods sold and delivered and on an account stated. The particulars claimed 9*l.* 17*s.* 6*d.* The defendant pleaded, as to all except two sums of 1*l.* 0*s.* 6*d.* and 8*l.* 17*s.*, nunquam indebitatus; as to 1*l.* 0*s.* 6*d.*, payment into Court; and as to 8*l.* 17*s.*, a set-off. Issue on the first and third pleas; the plaintiff took out of Court the money paid in under the second. *Semble*, that upon this record the plaintiff had nothing to prove, and that the only issue was on the defendant. *Newhall v. Holt*, 662

(8). In Detinue.

The plea of non detinet merely puts in issue the fact of detention. If the defence be that the plaintiff was not possessed of the goods, or that the defendant was justified in detaining them, such a defence ought to be specially pleaded. *Richards v. Frankum*, 420

(9). In Actions on Bills and Notes.

Plea, to an action of debt by the payee against the maker of a promissory note payable on demand, that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorized by him; and that there was not any consideration or value for the making or payment of the note, except as aforesaid:—*Held* bad on general demurrer.

The plaintiff replied, that after the making of the contract, the defendant paid part of the purchase-money, and was let into possession, and that the plaintiff had always been ready and willing to execute a conveyance:—*Quære*, whether this replication was bad for multifariousness. *Jones v. Jones*, 84

III. Replication.

(1). *De injuriâ*.

To an action on a bill of exchange by the indorsee against the acceptor, the defendant pleaded, that the bill was drawn and accepted for the accommodation of B.; that B. indorsed and delivered it to the plaintiff, in order that he the plaintiff should discount it and pay the value to B., but that the plaintiff did not discount it or pay the value to B., or to the drawer, or to the defendant. To this plea the plaintiff replied, *de injuriâ*:—*Held*, that the replication was good, inasmuch as the plea amounted to matter of excuse for the nonpayment of the bill.

The defendant pleaded, also, that after the indorsement and before the commencement of the suit, the plaintiff indorsed and delivered the bill to a person, whose name is to the defendant unknown; and the defendant then became, and still is, liable to pay the amount to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been and is the holder thereof. Replication, that at the time of the commencement of this suit the plaintiff was, and *still is*, the holder of the said bill; without this, that any other person is the holder thereof, in manner and form as in that plea is alleged:—*Held*, that this replication was bad, as the traverse was too large, and put in issue the plaintiff's being the holder of the bill, not only at the time of the commencement of the suit, but also at

the time of the plea pleaded, which was immaterial. *Basan v. Arnold*, 559

(2). *When a Departure from Declaration.*

1. In trover, the declaration alleged that the plaintiff was lawfully possessed of the goods "as of his own property;" and the replication, in answer to a special plea in justification, set up a right to the possession of them in respect of a lien:—*Held*, that this was not a departure. *Legg v. Evans*, [and see ante, II. (9)], 36

2. Declaration in covenant by A., the surviving lessor in a lease for years, granted by A., B., and C., to the defendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term. Plea, that A., B., and C., from the time of making the demise until the death of B., and A. and C. afterwards, had a reversion for a longer term of years, expectant on the lease, and that after B.'s death, and before any breach of covenant, A. and C. assigned such reversion to D., and thenceforward ceased to have any reversion or interest in the demised premises. Replication, that A., B., and C. were not until the death of B., nor were A. and C. afterwards, possessed of the said reversion in the demised premises, in manner and form as alleged in the plea:—*Held* bad, on demurrer, as being a departure from the declaration. *Green v. James*, 656

IV. *Similiter*.

Dating.

Semble, that where a party adds the *similiter*, forming part of his own pleadings, it is a pleading within R. H. T., 4 Will. 4, s. 1, and must bear a date, or it may be set aside for irregularity. Such irregularity is not waived by the party to whom the issue

so made up is delivered, omitting to take that objection, on attending a summons to shew cause why the action should not be tried before the sheriff. *Middleton v. Woods*, 136

V. Demurrer.

(1). When too large.

A demurrer commencing, "And the defendant says that *the said declaration* is insufficient in law," and then proceeding to assign separate causes of demurrer to each count of the declaration, is in form a demurrer to the whole declaration; and if any count be good, the plaintiff is entitled to judgment, the demurrer being too large. *Parrett Navigation Co. v. Stower*, 564

(2). When frivolous.

The Court set aside, as frivolous, a demurrer to a count on a bill of exchange by indorsee against acceptor, on the ground that (after stating that J. & C. made the bill) it stated it to be payable to *the drawers'* order, not then naming them: and they refused to let in the defendant to plead a plea which, as he alleged, shewed that the bill was without consideration. *Knill v. Stockdale*, 478

VI. Profert.

1. The plaintiff alleged as an excuse for not making profert of a deed, that it was "in the possession of certain persons, to wit, J. B. H., & T. H., who before and at the time of the commencement of the suit, and thence hitherto, have held and still hold the same by agreement theretofore in that behalf made between the plaintiff and the defendant:"—*Held*, that this was not a sufficient excuse for the want of profert, as it did not allege that the party who had possession of the deed had refused to produce it. *Hill v. Marsden*, 718

2. In pleading a conveyance by lease

and release, profert must be made of the release. *Jenkin v. Peace*, 722

POUND BREACH.

See DISTRESS.

PRACTICE.

See JUDGE'S ORDER.
PARTICULARS.
PROCESS.

1. Deposit in Lieu of Bail.

Where a defendant, on being held to bail under a Judge's order, deposits with the sheriff the amount indorsed on the writ, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2, and afterwards allows those sums, with an additional 10*l.*, to be paid into Court, the plaintiff is not entitled to have the two former sums paid out to him. *Scherwinski v. Peronnet*, 90

2. Service of rule.

Service of a rule by giving it to the defendant's servant at his warehouse, that being his usual place of business, held insufficient. *Ibbotson v. Phelps*, 626

3. Service of Judge's Order.

A party obtaining a Judge's order ought to serve it "forthwith," i. e., before the opposite party can take the next step. And where a party, at 5 o'clock on the day before the time for joining in demurrer expired, obtained an order for three days' time to join in demurrer, which was not served until two o'clock on the following day, and the plaintiff had signed judgment at the opening of the office at 11 o'clock on the same morning:—*Held*, that the order had been served too late. *Kenney v. Hutchinson*, 134

4. Staying Proceedings.

1. In an action by the owners of goods which were on board a vessel,

and were lost by a collision with the defendant's vessel, the jury having found a verdict for the defendants, the plaintiffs in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record. The Court refused, on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was stated on affidavit that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other: the Judge being satisfied with the verdict. *Yates v. The Dublin Steam Packet Company*, 77

2. Where the trustees of a lady, who had authorized the defendant to receive her rents, countermanded his authority, and brought an action to recover the money received by the defendant under that authority:—*Held*, that the Court had no power to order the proceedings in the action to be stayed, in order to give time to the defendant to obtain an injunction to restrain the action. *Vanderstegen v. Witham*, 457

5. Judgment as in Case of Nonsuits.

1. Issue joined, in a country cause, in Michaelmas Vacation, and no notice of trial given. A motion for judgment as in case of a nonsuit, in Trinity Term, is too soon; for the issue joined in vacation is referred to the subsequent term. *Dore v. Hayden*, 626

2. Where, in answer to a rule for judgment as in case of a nonsuit, the plaintiff deposed that since action brought he had been informed by the defendant's neighbours, and which he believed to be true, that the defendant was insolvent:—*Held*, that this was not sufficient to compel the defendant to accept a stet processus, but that the defendant was entitled to a peremptory undertaking. *Symes v. Amor*, 814

6. Setting aside Judgment.

An affidavit in support of rule to set aside an interlocutory judgment, must state in express terms that judgment has been signed: and it was held not to be sufficient to state that a rule to compute had been served on the defendant. *Classey v. Drayton*, 17

PRESCRIPTION ACT.

See RIGHT OF PASTURAGE.

To an action of trespass qu. cl. fr., the defendant pleaded a right of way across the locus in quo for the occupiers of B. field, on foot, and with cattle and carriages, enjoyed as of right and without interruption for twenty years before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71. The replication traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of Parliament (the Trent Navigation Act, 23 Geo. 3, c. 48) under which the Trent Navigation Company, before the commencement of the twenty years, made a haling-path for towing vessels along the river, across the locus in quo, into B. field; that after the commencement of the twenty years, under the powers of another act of Parliament, (the Dunham Bridge Act, 11 Geo. 4, c. lxvi), another haling-path was set out nearer to the river, but also across the locus in quo and into B. field, and that thereupon the Navigation Company abandoned the former haling-path, which thenceforth ceased to be used as such: that, before and at the commencement of the twenty years, the occupiers of B. field used and enjoyed as of right and without interruption, by virtue and under the provisions of the first act of Parliament, a way along the first-mentioned haling-path, across the locus in quo, on foot and with cattle, which right of way ceased and determined on the abandonment of

that halting-path: but that from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way as a continuation of the right before enjoyed by them under the act of Parliament, continued to use the same way; which way, and the use and enjoyment thereof along the halting-path as aforesaid, is the same way, and the same use and enjoyment thereof, as in the plea mentioned, except as to the user with carriages:—*Held*, on demurrer, that the replication was good: that it disclosed facts shewing that the defendants' user, although as of right and without interruption during the twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, ss. 2 & 5, was not such as would, before the statute, have been sufficient to prove a claim by prescription or non-existing grant: and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea. *Kinloch v. Neville*, 795

PRINCIPAL AND AGENT.

See STOCK-BROKER.

(1). *False Representation by Agent.*

Assumpsit for the non-performance of an agreement to take a ready-furnished house. Plea, that the plaintiff caused and procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him; on which issue was joined. It appeared at the trial, that the plaintiff had employed one C. to let the house in question, and the defendant being in treaty with C. for taking it, asked him "if there was any objection to the house," to which he answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on

that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not:—*Held*, (Lord Abinger, C. B., dissentiente), that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea. *Cornfoot v. Fonke*, 358

(2). *Revocation of Agent's Authority.*

Case.—The declaration, by assignees of bankrupts, stated, that the defendant was a commission-agent at Montreal, and that the bankrupts, before their bankruptcy, delivered to him certain goods, which were not to be sold at less than invoice prices; that at the time of the bankruptcy a large quantity of these goods remained in the defendant's hands unsold; that the plaintiffs, being assignees of the bankrupts, directed the defendant not to sell the goods at less than invoice prices, until he had rendered to them an account of the goods, and the plaintiffs had been enabled to judge, and had determined and given the defendant notice, whether they would redeem the goods without sale or not. Breach, that the defendant, after the bankruptcy, and after he had rendered an account of the goods, sold them at less than the invoice prices, although the defendant, after the rendering of the account, and before the sale, was required by the plaintiffs, and they gave him notice to send the goods to England, and that they would redeem them without sale. The

defendant pleaded, that after the bankrupts had caused the goods to be delivered to him, and before and at and after their bankruptcy, and whilst the goods remained unsold in his hands, the defendant, for advances made before the bankruptcy, had a lien upon the goods; that the bankrupts, before their bankruptcy, and after the delivery of the goods, in consideration of the advances by the defendant, agreed with the defendant that he should sell the goods at the best market prices, and realize thereon against his said advances; that the defendant, relying upon the authority to him to sell and realize against his said advances, permitted his advances to remain unpaid for a long time, to wit, until and at and after the bankruptcy; that after the bankruptcy, and after the defendant had rendered an account of the goods, and whilst they were unsold, the plaintiffs did not tender or offer to pay the defendant his advances or lien, or to redeem the goods before the defendant should part with them, and the said goods so remaining on hand were then deteriorating and depreciating in price, and the market getting worse; wherefore he, the defendant, exercising his best judgment for the estate of the bankrupts, and the plaintiffs as assignees, and to realize his advances, after he was required to send the goods to London to be redeemed, sold the said goods at the best market prices, according to the said authority of the bankrupts to him in that behalf, using his best judgment therein, as he lawfully might; and after giving credit for the proceeds under such sale, there still remained due to the defendant a large sum of his said advances, and the estate of the bankrupts, and the plaintiffs, as assignees, were still indebted in a large amount on account of the advances:—*Held*, first, that the breach did not, by alleging that the plaintiffs gave the defendant notice to

send the goods to England, render the declaration bad; secondly, that the plea was bad, as it shewed no consideration for any agreement which deprived the bankrupts or the assignees of their right to revoke the authority to the defendant to sell. *Raleigh v. Atkinson*, 670

PRINCIPAL AND SURETY.

See STATUTE OF LIMITATIONS, (2).

PROCESS.

(1). *Writ of Summons.**Amendment of.*

1. Where a writ of summons was by mistake dated the 4th of April, the præcipe being dated the 4th of May:—*Held*, that a Judge had power to order an amendment of the writ, so as to make it correspond with the præcipe. *Kirk v. Dolby*, 636

2. The plaintiffs having brought an action of *debt* against the defendant, obtained a distringas and proceeded to outlawry. The defendant did not render to the sheriff on the exigent, but before the last proclamation entered an appearance, but without obtaining a supersedeas. The plaintiffs thereupon stayed all proceedings in the outlawry; but having another cause of action against the defendant on a special contract, commenced an action of *assumpsit* against him, and applied to his attorney to appear for him, which the latter refused to do. The plaintiffs then proposed to consolidate the two actions, by changing the first writ in debt into *assumpsit*, so as to include both causes of action in the latter. This the defendant refused to do, and kept out of the way to avoid being served with the writ. The Court refused to set aside the appearance to the first writ, or to allow that writ to be amended. *Green v. Kettleby*, 731

PROMISSORY NOTE.

(2). *Capias*—Form of.

A writ of ca. sa., issued after the passing of the 1 & 2 Vict. c. 110, but before the promulgations by the Judges of the forms of writs of H. T., 3 Vict., commanded the sheriff to take the defendant to satisfy the debt and costs, together with *interest* at the rate of £4 per cent., and to have that money, with such interest, before the Court, &c., and to all such things as by the statute of 1 & 2 Vict. he was authorized and required to do in that behalf:—*Held*, that the party might alter the writ, conformably to the additional remedies given by the statute, although no new form had yet been promulgated by the Judges: and that the above form of writ was good. *Erdy v. Martin*, 480

(3). *Distringas*.

1. Service of *distringas* on lunatic. *Humphreys v. Griffiths*, 89

2. The keeper of a lunatic having refused to allow the lunatic to be served with a writ of summons, the Court granted a rule for a *distringas*, to be served in the first instance upon the friends of the lunatic, and if they could not be found, upon the keeper. *Branson v. Moss*, 420

(4). *Writ of Sequestration*.

Where a writ of sequestration was returned to this Court before the plaintiff's execution was satisfied, the Court allowed it to be taken off the file and sent back to the Bishop, in order that he might take the return off the writ and certify to the Court what he had done under it. The rule for that purpose is absolute in the first instance. *Alderton v. St. Aubyn*, 150

PROMISSORY NOTE.

See **BILLS AND NOTES.**

RAILWAY ACT.

RAILWAY.

See **WAYLEAVE.**

RAILWAY ACT.

See **TURNPIKE-ROAD.**

(1). *Construction of*.

By the Hull and Selby Railway Act, 6 Will. 4, c. lxxx. s. 69, it is provided, "that where any part of any carriage, horse, or foot road, railway or tram road, quay, *wharf*, slope or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, &c., and for transporting, &c., of goods and merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low-water mark the defendants constructed their railway, (in the line prescribed by the act of Parliament), thereby rendering the communication between the wharf and the river inconvenient and dangerous:—*Held*, that the plaintiff's wharf was thereby injured within the meaning of this section, (which was not confined to an injury done *bodily* to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendants, and was not bound

to apply for compensation under another section of the act, which empowered a sheriff's jury to assess the sum payable for any future temporary, or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act.

Under what circumstances proprietors of the railway, who had parted with their shares in order to become witnesses for the defendants, were competent, *quære*. *Bell v. Hull and Selby Railway Company*, 699

(2). *Construction of—Action for Calls.*

By the Edinburgh and Leith Railway Act, 6 & 7 Will. 4, c. cxxi. s. 50, it is provided, that in actions by the Company for calls, it shall be sufficient to allege, that the defendant, being a proprietor of so many shares, is indebted to the Company in such sum of money upon such shares belonging to him, whereby a right of action hath accrued to the Company by virtue of this act, without setting out the special matter; and in such action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls, that they were in fact made, and that notice thereof was given according to the act. To a declaration in the general form given by this clause, the defendant pleaded pleas denying notice of the calls pursuant to the act, and concluding with a verification:—*Held*, that the allegation of notice, that being a fact necessary to be proved in order to entitle the plaintiffs to recover, must be taken to be impliedly contained in the declaration, by reference to the act of Parliament; and therefore that the pleas, being in denial of a matter necessarily implied in the declaration, ought to have concluded to the country and not with a verification, and were on that ground bad on special demurrer.

Semble, that in such case, the plea of not indebted would sufficiently put

in issue all the matters required by the act to be proved in support of the action.

By another section of the act, (s. 49), the directors were empowered to make the calls in manner therein mentioned, and to sue for them, in case of nonpayment, by action of debt; or otherwise, in their option, the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the Company: provided, that no advantage should be taken of any such forfeiture, until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the Company within six months after such forfeiture should happen, which declaration should ipso jure be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded, that by reason of having neglected to pay calls on his shares, they were, in pursuance of the act, declared by the directors to be forfeited, and the directors exercised and declared their option, according to the act, that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture:—*Held*, on special demurrer, that the plea was bad, for not shewing that the shares were declared to be forfeited at a general or special meeting of the Company, according to the provisions of the act. *Edinburgh, Leith, and Newhaven Railway Company v. Hebblewhite*, 707

(3). *Construction of—Inquisition under.*

The Bristol and Exeter Railway Act, 6 & 7 Will. 4, c. xxxvi. s. 25, enabled the Company, in case (inter alia) any person whose lands should be required for the purposes of the act, should, for twenty-one days after

notice in writing given to him, neglect or refuse to treat, or should not agree with the Company, for the sale of his interest, to issue a warrant under their common seal, or under the hands of three at least of the directors, to the sheriff of the county in which the lands should be, commanding him to summon and return a jury, who should inquire of, assess, and give a verdict for the amount of money to be paid for the purchase of such lands, and for compensation for damage thereto: and that the sheriff should accordingly give judgment for such purchase-money, &c., which should be binding and conclusive upon all persons; fourteen days' notice being given of the time and place of the inquiry. A subsequent clause of the act (s. 242) enacted, that the whole of the sum therein mentioned as the probable expenses of making the railway, &c., should be subscribed for before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway, should be put in force.

An inquisition taken under s. 25, recited, that notice had been given to the party that his lands were required by the Company for the purposes of the act, and that he had not within twenty-one days afterwards agreed with the Company for the sale of them; and also that fourteen days' notice had been given of the time and place of the inquiry before the sheriff:—*Held*, in ejectment by this party against the Company for these lands, subsequently taken by them under the act, that the inquisition was sufficient in form, and that it need not set forth that the whole capital had been subscribed; but that if this were the fact, it should come by way of answer from the plaintiff.

The 57th section of the act enacted, that the lands to be taken for *the line* of the railway should not exceed twenty-two yards in breadth, except

where a greater breadth should be necessary for waiting-places, embankments, cuttings, &c. &c.: and the 59th section provided, that the Company, in making the railway and other works, should not *deviate from the line* delineated on the plan deposited with the clerk of the peace in pursuance of the act, with or without consent of the owners or occupiers of the lands, more than 100 yards, and that no deviation should *extend into the lands* or property of any person not mentioned in the book of reference to the plan, unless omitted by mistake: and the Company were empowered to make such deviations *in the section* as might be necessary in consequence thereof:—*Held*, that this section only prohibited the Company from making the substituted *line of the railway itself* at a greater distance than 100 yards from the line delineated in the plan; but that it did not prevent them from taking lands at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c.; the intention of the act being to give the Company the same incidental powers with respect to the deviated line, as they had with respect to the original line.

Held, also, that a party whose lands were so taken could not object that the Company had taken, for the same purpose, lands of another person not mentioned in the book of reference.

The 47th section of the act enabled the Company, on payment of such sum as *should have been* awarded by the jury to the party, or, in case (*inter alia*) he should refuse or neglect to convey the lands, on payment of it into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to the credit of the party, subject to the order of the Court, to enter upon and take the lands. By the 257th section, the compulsory powers of the act were

limited to the period of two years after the passing of the act; which expired on the 19th of May, 1838. By a subsequent act, 1 Vict. c. xxvi. (which received the royal assent 12th June, 1838) s. 1, all the powers and clauses of the former act were to extend to the works, &c., to be done under that act, as if repeated and re-enacted in it. S. 2 repealed s. 47 of the former act. S. 12 *revived* the time limited by the former act for taking and using lands, and extended and enlarged it for three years from the expiration of the two years mentioned in the former act: and s. 14 enacted, that upon payment of such sums as *should have been* awarded by the jury into the Bank of England, as in the recited act directed, the Company should have power to enter &c., [re-enacting s. 47 in terms].

An inquisition was taken under the 6 & 7 Will. 4, within the two years limited by that act. On the 11th of June, 1838, the Company obtained an order of the Court of Exchequer for payment of the purchase-money into the Bank; and on the 21st they paid it in accordingly, the plaintiff not having in the meantime offered to convey:—*Held*, that these proceedings were warranted by the 1 Vict. c. xxvi. s. 14, and might be founded on the inquisition taken under the former act. *Doe d. Payne v. Bristol and Exeter Railway Co.* 320

RAILWAY SHARES.

Conveyance of.

The Brighton Railway Act, 1 Vict. c. cxix. s. 155, requires the conveyance of shares to be by writing, duly stamped, to be under the hands and seals of both parties. The clause afterwards calls the instrument a "deed or conveyance," and a "deed of sale or transfer:"—*Held*, that this conveyance must, in order to satisfy the statute, be by *deed*: and therefore that an instrument of transfer of shares, executed

by the proprietor of such shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser, was void. *Hibblewhite v. M'Morine*, 200

RELEASE.

See PLEADING, II, (5).

REPUTATION.

See FERRY.

REVERSION.

See PLEADING, III, (2).

RIGHT OF PASTURAGE.

To an action of trespass for taking the plaintiff's cattle in an open field called P. & G. field, and impounding them, the defendant pleaded, first, that T. B., and his ancestors, had been immemorially used and accustomed to have, for themselves and their heirs and assigns, the sole and several pasturage in 217 acres of P. & G. field, in gross, for all his and their cattle, from the 4th Sept. to the 5th April; that T. B. in 1755, by indenture, granted the said pasturage to S. B., his heirs and assigns for ever; that J. B. (who claimed by descent from S. B.) in 1836 demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing on the said 217 acres. The second plea alleged a right of sole pasturage, in gross, for thirty years before the commencement of the suit, (under the stat. 2 & 3 Will. 4, c. 71. s. 2), in J. B. and his ancestors, and a demise from him to the defendant; concluding as in the first plea. The replication traversed the right of T. B., as alleged in the first plea, and the enjoyment of J. B. as of right without interruption, for thirty years, as alleged in the second.

It appeared in evidence, that within the last twenty years encroachments had been made by buildings and inclosures on the 217 acres, and that above thirty acres had thus been appropriated, but no encroachments had been made on that part of the 217 acres on which the alleged trespass was committed:—*Held*, that these interruptions, being so recent, did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that, not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea.

Held, also, 1st, that recitals in a deed-poll of the date of 1800, made by an ancestor of the present owner of the pasturage, and relating to the pasturage, were admissible in evidence to prove the marriages, deaths, &c., of the ancestors of the owner: 2ndly, that leases and agreements made by the ancestors of the present owner, demising the pasturage in question, were evidence to prove the seisin and user of T. B., the grantor, as shewing the enjoyment by parties who claimed under him.

Held, also, that the right of pasturage alleged in the pleas was capable of being granted away, and did not necessarily descend to the heir of the grantor.

Quære, whether such a right of pasturage, in gross, be within the 5th section of the Prescriptive Act, 2 & 3 Will. 4, c. 71. *Welcome v. Upton*, 536

RULE OF COURT.

See Costs, (2).

SEDUCTION.

An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic ser-

vice of another person: although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father's when she quitted her service, unless she should go into another service. *Blaymire v. Haley*, 55

SEQUESTRATION.

See Process, (4).

SET-OFF.

See PLEADING, II, (8).

SEWERS.

See COMMISSIONERS OF SEWERS.

SHERIFF.

See LIEN.

PLEADING, II, (3).

WRIT OF TRIAL.

Liability of, under 8 Anne, c. 14.

Case against a sheriff. The first count was framed upon 8 Anne, c. 14, s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, and of which arrear the defendant had notice; and stated, that the defendant took the goods of T., the tenant of the plaintiff, under a *fi. fa.* issued against T. at the suit of B. This was not traversed by the pleas, and no other execution appeared:—*Held*, That the connexion of the party who was shewn to have seized the goods with the defendant, sufficiently appeared, without producing any warrant from the defendant to that party.

The second count was in trover for seizing the same goods. The plaintiff put in a bill of sale of them, which had been delivered to him by his tenant before any rent was due. The tenant had remained in possession as before. The jury found the bill of sale fraudu-

lent:—*Held*, that although the bill of sale might still be valid against the plaintiff as a party to it, though void as to other creditors, the plaintiff was not prevented from recovering on the first count, that being distinct from the second. *Reed v. Thoyts*, 410

SHERIFFS.

Transfer of Writs to succeeding Sheriff.

In the year 1837 two writs of *fi. fa.*, one at the suit of S. for £1034, the other at the suit of C. for £530, were issued against the West Cork Mining Company, and lodged with the sheriff of Surrey, who seized goods of the company to a large amount. Proceedings in Chancery were then instituted by the Company, and injunctions granted to restrain the sheriff from selling the goods, but he nevertheless sold them, and they realized £1370, which he paid into his banker's hands to the account of the sheriff. On the 6th of June, 1839, (the proceedings in Chancery being still pending), the plaintiff issued a *fi. fa.* against the Company, directed to the defendant, the sheriff for that year, and gave him notice of the former levy. On the 8th of August the proceedings in Chancery terminated; the result of which was, that the debts of S. and E. were reduced to £545, which reduced amount was paid over to them by the sheriff, and the residue, £825, paid over to the Company, and the sheriff returned *nulla bona* to the plaintiff's execution. The same person acted as under-sheriff in the years 1837, 1838, and 1839:—*Held*, in an action for a false return, that the present defendant was not liable, inasmuch as the former writs were wholly executed by the seizure and sale of the goods by the sheriff in 1837, and therefore ought not to be transferred to the present defendant under 3 & 4 Will. 4, c. 99, s. 7, as

writes "not wholly executed;" and that he was not rendered liable by having employed the same under-sheriff.

Held, also, that the balance of the proceeds of the goods after satisfying the two former executions, constituted a debt from the sheriff who levied in 1837 to the Company, and as such could not be taken in execution under 1 & 2 Vict. c. 110, s. 12. *Harrison v. Paynter*, 387

SHIPPING.

(1). *Liability of Charterer for Demurrage.*

The charterer of a ship for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost, after the completion of the loading. *Pringle v. Mollett*, 80

(2). *Authority of Master.*

The master of a ship has authority by law to pledge the credit of his owner resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury. *Arthur v. Barton*, 138

SMUGGLING ACTS.

An information alleged the seizure of a certain vessel, being a foreign vessel, for being found within a league of the coast of the United Kingdom, "the said vessel having had on board certain spirits, the said spirits not being in casks or packages containing twenty gallons *each* at the least *respectively*, contrary to the form of the statute in that case made and provided; whereby, and by force of the statutes in that case made and provided, the said vessel &c. became and was forfeited." By the 3

& 4 Will. 4, c. 53, s. 2, it is provided, that vessels found within a league of the coast of the United Kingdom, having on board any spirits not being in a cask or package containing forty gallons at the least, shall be forfeited. The 6 & 7 Will. 4, c. 60, s. 4, enacts, "That the said restrictions shall not extend to any such spirits in casks of not less than twenty gallons." The 58th section of the 3 & 4 Will. 4, c. 52, renders certain goods subject to restrictions or importation, and amongst them specifies, "spirits, not being perfumed or medicinal spirits:"—*Held*, first, that the information was not bad by reason of the introduction of the words "each" and "respectively," although those words were not in the statute; secondly, that, as the 6 & 7 Will. 4, c. 60, s. 4, repealed sect. 2 of the 4 Will. 4, c. 53, only as related to the number of gallons, the information was not bad for alleging the offence to have been committed against the form of the statute; thirdly, that the information was not bad for alleging the forfeiture to have accrued by force of the statutes, since the words, "whereby, and by force of the statutes," &c., might be rejected as surplusage; fourthly, that, as the information was not framed on the 3 & 4 Will. 4, c. 52, s. 58, it was not necessary to state that the spirits seized were not "perfumed or medicinal spirits." *Attorney-General v. Le Revert*, 405

STATUTE.

See LIMITATION ACT.
RAILWAY ACT.
STOCK-BROKER.

STATUTE OF FRAUDS.

Variation of Written Contract by Parol.

The terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds, can-

not be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing. *Marshall v. Lynn*, 109

STATUTE OF LIMITATIONS.

(1). *Running of.*

It is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted. *Rhodes v. Smethurst*, 351

(2). *Operation in Action by Surety.*

By a promissory note, E. H., W. D., & J. H., jointly and severally promised to pay to J. E. £300, with interest. W. D. having afterwards paid J. E. £280 on account of the note, J. E. made the following indorsement upon it:—"Received of W. D. the sum of £280, on account of the within note, the £300 having been originally advanced to E. H." In an action brought by W. D., who had paid the whole amount due, against J. H., to recover contribution from him "as a co-surety:"—*Held*, that the indorsement was admissible, in evidence, to prove not only the payment of the £280, but also that the money was originally advanced to E. H. as principal.

The amount of principal and interest was paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was paid by him within that period. The Statute of Limitations having been pleaded:—*Held*, that the plaintiff was

entitled to recover only to the extent of £30 which had been paid within the six years, and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion.

Held, also, in an action on the same note against E. H., the principal, that the Statute of Limitations was a bar to all except £30, as the plaintiff had a right of action against the principal the moment he paid anything, for so much money paid to his use. *Davies v. Humphreys*, 153

(3). *Part Payment.*

The plaintiff, an attorney, had done professional business of various kinds for the defendant, in 1827, and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2*l.* 2*s.* and 10*s.* 6*d.*, inclosing receipts for those sums, for the defendant's signature, and concluded, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2*l.* 2*s.* and 10*s.* 6*d.*, were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs, amounting to £289, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for £3 and £5, cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in Jan. 1839:—*Held*, that the letters given in evidence

did not sufficiently shew that the 2*l.* 2*s.* and 10*s.* 6*d.* were paid in part discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations, as to any part of the demand. *Waugh v. Cope*, 824

STOCK-BROKER.

Indebitatus assumpsit, in £5,000, for certain £3 per cent. stock alleged to be sold, and caused to be transferred, by the plaintiff to the defendant, and by the defendant duly accepted. Pleas—1st, non assumpsit; 2nd, that the defendant did not accept the stock from the plaintiff. At the trial it appeared that one T., a stock-broker, had applied to the plaintiff, a stock-jobber, for the purchase of stock to the amount of £5,000 for the defendant. The plaintiff, not having any stock of his own, applied to W., who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal were disclosed; though credit is sometimes given to the principal, and his cheque taken, where the broker's credit is not thought sufficient:—*Held*, that under these circumstances the learned Judge was right in leaving it to the jury to consider, whether the plaintiff sold the stock on the credit of T., and T. only, or on the credit and responsibility of the principal, the defendant, and the jury having found the latter, that the verdict was right:—

Held, also, that although the plaintiff was not in possession of the stock at the time of the sale or transfer, he could maintain indebitatus assumpsit for the price of it: and that the contract was not prohibited by the stat. 7 Geo. 2, c. 8, s. 8, as that only applies to fictitious sales of stock, and not to cases where the stock is actually transferred, although the seller was

not possessed of it at the time of the contract.

A witness having been called to prove on the part of the plaintiff, that, immediately after the transfer had taken place, the plaintiff requested T. to give him the cheque of his principal:—*Held*, that this evidence was admissible, not as amounting to an admission, but as part of the *res gestæ*.

In order to prove the acceptance of the stock by the defendant, evidence was adduced that T., and a person unknown to the clerk in the Bank, came there with T. and made an entry of his acceptance of the stock, and a witness was then called who proved that he had inspected the Bank books, and that the signature to the acceptance of the stock was in the defendant's handwriting:—*Held*, that this evidence was admissible to prove the acceptance of the stock by the defendant, and that it was not necessary that the Bank books themselves should be produced, they not being removable on the ground of public convenience.

On the part of the defendant, several letters, containing accounts between the defendant and T., were offered in evidence to prove the existence of a debt from T. to the defendant to the amount of the stock transferred. Other evidence had been given which shewed that fact on the part of the plaintiff, and the plaintiff's counsel admitted in his reply, that the existence of the debt from T. to the defendant had been sufficiently established. The defence turned on a point collateral to this question. This evidence having been rejected:—*Held*, that rejection of it did not form a sufficient ground for a new trial.

Held, also, that the allegation in the declaration, of the acceptance of stock from the plaintiff, was sufficiently shewn, although made through the medium of W. *Mortimer v. M'Callan*,

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SUBPENA.

See WITNESS, II.

SUPERSEDEAS.

See WRIT OF ERROR.

TOLLS.

See DISTRESS.

TROVER.

See PAWNBROKERS' ACT.

SHERIFF.

TURNPIKE-ROAD.

By a local act, 4 & 5 Will. 4, s. lxxi., (the London and Southampton Railway Act), it is enacted, that in all cases where the Railway shall cross any *turnpike road*, such turnpike-road shall be raised or sunk by and at the expense of the Company, so as the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road:—*Held*, that a road on which toll-gates are by law erected, and tolls taken thereat, is a turnpike-road, within the meaning of that act. *Company of Proprietors of Northam Bridge and Roads v. London and Southampton Railway Co.*, 428

VENDOR AND PURCHASER.

1. In an action by the intended purchaser against the vendor of an estate, the declaration stated articles of agreement between the defendant and the plaintiff, whereby the defendant in consideration of £2115, agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff &c., with a good title; and the plaintiff agreed, that, on the said 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and that in case the purchase should not be completed on the said 25th day of March, the plaintiff was to pay interest on the purchase-money before it was completed. Breach, that, although the plaintiff was always, from

the making of the agreement *until and upon the said 25th day of March*, ready and willing to accept a conveyance, and to pay the purchase-money, whereof the defendant had notice &c.; yet the defendant did not, on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title, &c.: alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's:—*Held*, that upon this declaration the plaintiff could not recover for any expenses or loss of interest subsequent to the 25th of March. *Metcalf v. Fowler*, 830

2. A declaration in covenant by the vendor against the intended purchaser of lands, for nonpayment of the purchase-money according to the contract, need not aver that the plaintiff *offered* a conveyance to the defendant; it is sufficient to allege that the plaintiff has always been *ready and willing* to execute a conveyance; inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution.

By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c.—*Held*, that this covenant was several, and that the plaintiff might sue alone for the nonpayment of his share of the purchase-money, without joining the other parties beneficially interested. *Poole v. Hill*, 835

VENUE.

An affidavit to bring back the venue, made by the plaintiff's wife, is insuffi-

cient, unless it appear that the husband was too ill to attend before a commissioner to make one, and that the wife is fully acquainted with the nature and particulars of the action. The proper person to make the affidavit, under such circumstances, is the plaintiff's attorney. *Williams v. Higgs*, 133

WARRANT OF ATTORNEY.

(1). *Attestation.*

1. A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose. A defendant may apply to set aside a warrant of attorney and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110, s. 9, although he have become bankrupt since the execution of it. *Taylor v. Nicholls*, 91

2. Where, on the execution of a warrant of attorney, one attorney only was present, and attested it on behalf of the defendant, who had acted on previous occasions for the plaintiff, and who made out his bill for the obtaining and preparation of the warrant of attorney to the plaintiff, the Court held that he was not such an attorney "attending on behalf of the defendant," as to satisfy the 1 & 2 Vict. c. 110, s. 9, and set aside the warrant of attorney. *Sanderson v. Westley*, 98

3. The defendant having agreed to give the plaintiffs a warrant of attorney to secure his debt to them, the plaintiffs employed P., an attorney, to prepare it. P. called with it on the defendant, and told him it must be signed in the presence of some professional man, and that he should procure Mr. S. to attest it; and the defendant accordingly went to procure S.'s attendance, but met him in the street, when P. told him they

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